2001

Remembering Mrs. Murphy: A Remedies Approach to the Conflict between Gay/Lesbian Renters and Religious Landlords

Marie Failinger

*Mitchell Hamline School of Law, marie.failinger@mitchellhamline.edu*

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/397

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
Remembering Mrs. Murphy: A Remedies Approach to the Conflict between Gay/Lesbian Renters and Religious Landlords

Abstract
There have been a number of legislative, caselaw and academic attempts at trying to resolve the conflict between the non-discrimination rights of gay and lesbian couples seeking housing and the free exercise rights of religious landlords who don't believe they should rent to unmarried couples. The academic writing often tries to resolve this conflict either by minimizing the harm to one of the parties (e.g., by categorizing the landlord's harm as merely commercial, or the tenant's as merely a problem of housing availability) or denying the relative importance of one of the party's rights. Others attempt a more positivist approach, arguing that the Free Exercise Clause or statutory demands or exemptions easily solve the problem. Most of these attempts presume that a liability approach is the only way in which such rights-vs-rights conflicts can be resolved: i.e., one party's rights are superior, entitling him or her to a full panoply of remedies. With a hotly contextual public moral issue, however, an all-or-nothing civil rights liabilities approach may exacerbate cultural conflict rather than moving society toward resolution. Exploring the gradually changing remedies approach of the Fair Housing Act as a possible model, this article argues that, in the early stages of recognizing the rights of gay/lesbian couples to non-discrimination in housing when such rights remain contested, awarding the right to the couple while significantly limiting their remedies is the best way to encourage dialogue in the midst of severe difference and eventually social resolution of these issues.

Keywords
Landlord and tenant, Homophobia in housing discrimination, Free exercise clause (Constitutional law

Disciplines
Civil Rights and Discrimination | Housing Law

This article is available at Mitchell Hamline Open Access: http://open.mitchellhamline.edu/facsch/397
REMEMBERING MRS. MURPHY: A REMEDIES APPROACH TO THE CONFLICT BETWEEN GAY/LESBIAN RENTERS AND RELIGIOUS LANDLORDS

MARIE A. FAILINGER*

I. INTRODUCTION

Mrs. Murphy, invented in the heat of battle during Congressional debates over the passage of the Civil Rights Act of 1964, has come back to haunt us. She is the mythical poor widow who did not wish to rent a room in her boardinghouse to an African American. In the political conservative account, she was the everywoman whose dignity and freedom the state should not deny by saddling her with tenants whom she would not choose as friends.

Copyright © 2001, Marie A. Failinger.

* Professor of Law, Hamline University School of Law. Thanks to my research assistant, Heather Toft.

1 The "Mrs. Murphy Boardinghouse" exemption originated with the public accommodation section, Title II of the Civil Rights Act of 1964, and was introduced into Title VIII, commonly known as the Fair Housing Act of 1968, through an amendment offered by Kentucky Sen. John Cooper. James D. Walsh, Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act, 34 HARV. C.R.-C.L. L. REV. 605, 607-08 (1999). See 131 CONG. REC. S429-07 (daily ed. Jan. 22, 1985) (remarks of Sen. Stafford) (giving Sen. George Aiken from Vermont credit for proposing the "Mrs. Murphy" clause for Title II to help break the legislative logjam on the FHA). Senator Walter Mondale and Edward Brooke introduced a similar amendment, 114 CONG. REC. S2495 (daily ed. Feb. 7, 1968) (remarks of Sen. Mondale). Senator Stennis objected to the fact that the amendment did not track "[t]he original Mrs. Murphy exemption contained in the 1966 bill [which] provided that—nothing contained in this bill shall be construed to prohibit or affect the right of any person, or his authorized agent, to rent or refuse to rent, a room or rooms in his home for any reason, or for no reason; or to change his tenants as often as he may desire." 114 CONG. REC. S3345 (daily ed. Feb. 19, 1968).

2 See Walsh, supra note 1, at 608-10; 114 CONG. REC. 3345 (daily ed. Feb. 19, 1968) (remarks of Sen. Stennis and Sen. Long); 114 CONG. REC.S3758-59 (daily ed. Feb. 21, 1968) (remarks of Sen. Holland, who complained about those who were trying "to push [the Fair Housing Act] down the throats of millions of American people who do not want such an amendment"). Senator Sam Ervin called the Fair Housing laws the "forced housing laws" and complained, "I cannot see where it is the duty of the Congress to rob every American who has residential property . . . of the right to sell or rent his property to whom he pleases. We have gotten like the Communists. They talk of the 'People's Democratic Republic, when they are speaking of governments which are dictatorships . . . . 114 CONG. REC. S2533 (daily ed. Feb. 6, 1968).
For her, Congress passed a blanket exemption to the public accommodation and fair housing provisions of the Civil Rights Act, excluding certain boarding houses and owner-occupied housing of no more than four units. For some conservatives and traditional liberals, the Mrs. Murphy exemption has been a sort of watchword about the dangers of federal government intrusion into private life. For progressives, she is a tragic reminder of the failure of the law to live up to the promise of the civil rights movement.

We need speculate to only some extent on what Mrs. Murphy and her fellow small landlords have been doing over these thirty-five years since they were exempted from the public accommodation and Fair Housing Act provisions of the Civil Rights Act. The evidence suggests that the aged Mrs. Murphy may still be refusing to rent her rooms to African Americans, given that over half of all African Americans and Latinos report discrimination in the rental and purchase of housing. However, it may be that, like most Americans, including some of segregation’s most celebrated opponents, Mrs. Murphy has come to believe that racial discrimination is odious, that

---


6 See, e.g., United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), cert. denied, 409 U.S. 934 (1972) (referring to § 3603(b)(2) as exempting “Mrs. Murphy’s now renowned rooming-house.”); Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972) (finding that landlords were exempt from FHA lawsuit because of the Mrs. Murphy exemption).

7 See, e.g., Bond, supra note 5, at 317 (reporting that African American families wishing to buy a home face a 59% chance of encountering housing discrimination and Latino families face a 56% chance, while these groups have a 50% chance of facing discrimination in rental housing, according to the Department of Housing and Urban Development (HUD)). See also 134 Cong. Rec. E2252-01 (remarks of Rep. Hayes) (daily ed. June 29, 1998) 1988 WL 173469 (noting that housing discrimination cases numbered two million per year, and that black families have a 48% chance of encountering racial discrimination in buying homes and a 72% chance in renting homes).

8 As the most famous example, George Wallace, who tried to stop black students from entering the University of Alabama and made an early career largely on a segregation and anti-federal government platform, has not only become an integrationist, but has been recognized for his efforts to promote African Americans into public positions. See Matthew Cooper, Legacy of a Healed Hater, George Wallace, 1918-1998, Newsweek, Sept. 28, 1998, at 51.
even to suggest that discrimination on the basis of race is acceptable is beyond the pale. Indeed, the rising jury verdicts in housing race discrimination cases bear out that American attitudes toward such discrimination are changing. One sensible way to read these apparently conflicting statistics is that when a person of color comes to rent from her, Mrs. Murphy may demur, not out of deliberate, "mean-spirited" racism which she knows is wrong, but because she continues (consciously or unconsciously) to harbor stereotypes about people of other races. This is an American reality that makes enforcement of the Fair Housing Act a continuing struggle in the national housing market, and the promise of a color-blind society elusive.

Now Mrs. Murphy's successor is in the legal spotlight for refusing to rent to unmarried couples, gay or straight. In the current debate, the iconic landlady is most sympathetically portrayed as a woman whose religious conscience will not permit her to cooperate in evil, even though the society around her seems to mock her traditional moral values. Her fight to protect "sacred" property as a value seems secondary, though some commentators continue to press property rights as an important part of her claim. This

---

9 See Bond, supra note 5, at 319.


11 The cases on this issue are still being decided in the state courts and the issue of unmarried tenant applicants and religious landlords was the topic of a panel at the American Association of Law Schools annual meeting in January 2000. Sponsored by the Sections on Law and Religion and Gay and Lesbian Issues, the meeting included presentations by Professors Thomas Berg and Michael McConnell, whose work is referred to herein.


13 The importance of property rights was frequently cited in opposition to the Fair Housing Act; see Leland Ware, New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act, 7 ADMIN. L.J. AM. U. 59, 71 (1993) (quoting Sen. Ervin); 114 CONG. REC. S3135 (daily ed. Feb. 15, 1968) (remarks of Sen. Ellender, who claimed that with the Fair Housing Act:

[e]very cherished liberty purchased at a high cost in Anglo-American history over the centuries is cast aside. All personal rights and liberties of the individual are ripped away for the alleged purpose of preventing discrimination. All the personal liberties wrung from the sovereigns from the Magna Carta to the Bill of Rights are trampled underfoot. If this (continued)
battle is not so national or pervasive as the battle over housing rights for African Americans, which galvanized national attention in the wake of city riots exposing the reality that America was literally becoming, in the Kerner Commission’s words, “two societies—one white and one black.”14 Rather, the new battle is being fought out more quietly, state by state, case by case, and year by year, due largely to the fact that Congress has never determined to eradicate discrimination based on marital status.15 Thus, unmarried couples have resorted to state human rights legislation to demand their civil rights in housing; and in several states, they have been successful, though not as successful as other groups.16

amendment becomes law, those guaranteed rights will be nothing but lies and dead concepts... Nothing so monstrous has been perpetrated on civilized people since the French and Russian Revolutions... Equality is the last refuge of the trifling, the shiftless and the incompetent.

Id.; 114 CONG. REC. S3755 (daily ed, Feb. 21, 1968) (remarks of Sen. Byrd, who noted that property rights were basic human rights existing before the Constitution, including in the Eighth Commandment, and risked destruction by the bill). See also 144 CONG. REC. S44-02 (daily ed. Apr. 1, 1998) (remarks of Sen. Symms, who objected that the Fair Housing Act Amendment handicap provision “makes a mockery of the concepts of individual liberty and private property” and complained that the federal government would be telling property owners how big their bathrooms and kitchens must be).

14 See Bond, supra note 5, at 324; Ware, supra note 13, at 73–74; 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (remarks of Sen. Mondale), noting:

We are... fighting for the minds and hearts of the vast middle ground of responsible Negroes, who have persevered in their commitment to progress through the courts and through the legislative process. The black racists are fighting to make these Negroes believe that white America is basically indecent... On the outcome of this crucial struggle hangs the future of this Nation. If the racists and extremists win, we face a real possibility of guerilla warfare in our major cities, lasting not just a few hot summer days, but for years—a Vietnam here at home....

15 This omission is telling, given that several states added marital status a decade or two ago to their civil rights laws. See, e.g., ALASKA STAT. § 18.80.240(a) (amended § 11, ch. 104, SLA (1975)); CA. GOV’T CODE § 12955(a) (amended Stats. 1975, c. 1189, p. 2943); MINN. STAT. ANN. 363.03 subd. 2. (1) (added Laws 1973, c. 729 § 3). Congress’ 1988 expansion of the Fair Housing Act has added disability and family status (that is, having children) to race, color, creed, and national origin as prohibited categories for making housing decisions. See 42 U.S.C. § 3604(a)-(f) (1994).

16 Although at least ten states have adopted marital discrimination laws, some do not include housing discrimination. Others adopt a similar “Mrs. Murphy-type” exemption for owners occupying a unit in their four-plexes, one state exempts all four-unit buildings, and

(continued)
While Mrs. Murphy's moral views on racial segregation have quite clearly lost the day in American society, she can be expected to linger as a figure in the American legal imagination, though her name in this battle is Mrs. Smith (or Mr. French). For those who tell her legend, she is one version of the independent, plain-speaking American hero with many faces, the lone pioneer who makes her own way now in harsh social territory, indifferent to the hypocrisy of the "civilized" (now termed "politically correct") community's attempts to coerce her into adopting the moral fashions of the day. Or in the silver screen version of that American legend, she is the Norma Rae or Erin Brockovich who stands up to say "no" to the great bureaucracies who threaten to crush the little person, having lost sight of the greater good. Conversely, for those who shudder at her intransigence, Mrs. Murphy—or Mrs. Smith—stands for the implacable human will, too steeped in its own ignorance, cruelty and unwillingness to acknowledge the truly Other as deserving respect and care. More abstractly, the Mrs. Murphys and Mrs. Smiths represent perhaps the most intractable cases our constitutional courts must adjudicate: those cases in which deeply cherished rights are pitted against each other, where vindication of one person's rights must necessarily abrogate conflicting rights of another.

Without arguing that Senator Mondale was right to introduce Mrs. Murphy into the public debate over fair housing, and certainly not defending the legacy of racial discrimination that Congressional compromises left behind, I would suggest that advocates on both sides of brewing civil rights disputes, particularly over gay rights, might gain from paying heed to the compromising approach of the Fair Housing Act authors. Of course, commentators continue to debate whether Congressional and court decisions to compromise principles for acceptability in the 1960s and 1970s made it more possible for racial change to occur without civil war, or whether their choices simply shored up racial intransigence, deepened and solidified the tragic complex of racial discrimination, poverty, violence and hopelessness, and permanently ended the promise of equal opportunity for many minority Americans. This article should not be read as an implicit contribution to either side of that debate, though it is clear that as we work through racial issues in American society, the long perspective of history will be confronted by the lingering, pervasive reality of racially prejudicial social choices that others exempt all religious landlords from their ambit. See Knutson, supra note 12, at 1695–1713.

17 See, e.g., Smith v. Fair Employment Hous. Comm'n, 913 P.2d 909 (Cal. 1996), (holding that a landlord who refused to rent to an unmarried couple was not exempted from housing discrimination laws because of her religious beliefs); Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (holding that refusal to rent to an unmarried couple did not constitute statutory discrimination on the basis of marital status).

18 See, e.g., Bond, supra note 5, at 316–21, 324.
pervade our life. This article will focus on fair housing as one of many emerging civil rights struggles that pit strong social, political and moral beliefs firmly against each other, and will consider how American society could resolve these conflicts in a way that respects the human dignity of those involved in the disputes and what they might teach us about the human condition.

I will also suggest that, in fiercely fought civil rights struggles, a jurisprudential strategy that incorporates a complex, reality-based perspective—even accepting the possible need for strategic compromises at certain points of history—is not necessarily an evil, depending precisely on the nature of the civil rights claim that presents itself. Nor does openness to legal compromise of opposing moral claims in these civil rights disputes necessarily mean that we must accept the Mrs. Murphy solution, such as preferring the rights of those who disagree with civil rights progress by fully exempting some businesses from the operation of civil rights laws. Rather, I will argue that remedies, not rights, may offer a more effective way to work through contested civil rights battles with due respect for the dignity of all parties involved. In fact, remedies deliberately planned to change over time along with solidifying social consensus about the wrongfulness of discrimination against minorities like gays and lesbians may provide a more lasting solution to these social battles than all-or-nothing solutions that marry rights and remedies. Such remedies should address both parties to the dispute as persons of conscience, as people who should be expected to encounter the moral claim of the Other with whom they do battle. Indeed, such legal remedies should be shaped around an imagination that civil rights opponents are human beings who are as willing to repair their moral mistakes

---

19 A number of states have accepted the exemption solution where marital discrimination and other forms of discrimination are concerned. See, e.g., COLO. REV. STAT. § 24-34-502(8)(a)(II) (2000) (exempting owner-occupied dwellings of up to four units from familial status discrimination law); HAW. REV. STAT. § 515-4(a)(1) and (2) (1993) (exempting landlords who live on the premises and rent one other unit and landlords who live on the premises and rent four rooms or fewer from housing discrimination law); MD. CODE ANN. art. 49B § 21(a)(2) (1994) (owner exempt from marital or sex discrimination prohibitions if rooms are rented in owner’s principal residence, or if owner occupies and rents no more than five units in a building); MICH. COMP. LAWS. ANN § 37.2503(1)(a) and (b) (West 1996) (excluding owner-occupied duplexes and rental of rooms in owner’s house); MINN. STAT. ANN. § 363.02 subd. 2(b) and (c) (West 1991) (excluding resident owner of duplexes from sexual orientation discrimination law); MONT. CODE ANN. § 49-2-305 (11) (1997) (excluding owner-occupied homes or duplexes from age and familial discrimination statute); N.H. REV. STAT. ANN. § 354-A:13 I (a), (b) and (c) (1995) (excluding three-unit owner-occupied houses and five-room boarding houses); N.Y. EXEC. LAW § 296(5)(a)(3) (McKinney 1998); WASH. REV. CODE. ANN. § 49.60.222(2)(c) (West 1998) (excluding owner occupied buildings of up to four units); Knutson, supra note 12, at 1728–29.
as to stand firm in their moral convictions. Such remedies, to be effective, should recognize that the process of getting individuals to see their moral error is a tremendously difficult and slow process for most, one that has no assurance of success. Indeed, the process of opening the eyes of civil rights wrongdoers carries a high risk of continuing or even escalating victimization, as the moral perpetrator comes to see and take responsibility for his error.20

In making this argument, the narrative I will use is the one which I believe presents the most intractable dilemma, because the claims of both parties are the most compelling. That narrative is of Mrs. Smith, a landlady, who because of strongly held, sincere religious beliefs feels impelled to refuse accommodations to tenants who are living in a sinful situation, in her view. In that narrative, Mrs. Smith is directly confronted by prospective tenants Mary and Martha or David and Jonathan (call them the Joneses), a lesbian or gay couple committed to making a family together, who are having difficulties finding housing in part because of social disapproval of their kind of family.

My narrative also assumes that both Mrs. Smith and the couple have reason to believe that they already have some real civil rights that they are properly concerned about losing. Mrs. Smith has rights to religious freedom embodied in state and federal constitutions as well as state human rights laws prohibiting religious discrimination.21 The Joneses’ equality rights—their rights not to suffer discrimination solely on the basis of their sexual orientation—are recognized by local ordinances,22 state statutes,23 and at least one fair reading of the United States Supreme Court’s constitutional opinion in Romer v. Evans.24 While it seems clear, looking over the past century of constitutional litigation and statutory extension, that Mrs. Smith’s civil rights are older than those of the Joneses, both of them currently rest on somewhat fragile legal ground from a positivist perspective, as I will suggest

21 See, e.g., Knutson, supra note 12, at 1683–86.
23 See, e.g., CAL. GOVT. CODE § 12955 (West 2000). See also CONN. GEN. STAT ANN. § 46a-81e(a)(1) (West 2000); MASS. GEN. LAWS ANN. Ch. 151B § 4 (6) (West 2000); MINN. STAT. ANN § 363.03 subd. 2. (a) and (b), 363.12 (2) (2) (West 1999); N.H. REV. STAT. ANN § 354-A:10 (1999); N.J. STAT. ANN. § 10:5-12 (g)(1) and (2) (West 2000); R.I. GEN. LAWS 1956 § 11-24-2.2 (West 2000); WIS. STAT. ANN § 106.04(1) (West 2000).
later. In order to find a way forward, however, I will assume that both Mrs. Smith and the Joneses can plausibly claim violations of their human rights.

Of course, landlords whose objections to such couples are morally but not religiously based, or are merely matters of personal distaste, as well as those who simply believe that the government should not interfere with property decisions, will also be affected by the resolution of this most difficult dispute.\textsuperscript{25} Heterosexual couples will also be affected, not just those whose decision not to marry is purely selfish, but also those who remain unmarried for more sympathetic reasons: consider couples facing severe economic losses (such as Social Security or pension benefits) if they marry; those threatened by former spouses or other family members on religious rejection if they re-marry; those who may be unable to convince partners to marry; or those that may be afraid to marry because of painful past experiences.\textsuperscript{26} Whether these sorts of reasons change the balance of harms or of rights is not something I will attempt to resolve, though they do make the choices with respect to both liability and remedy much more difficult.

II. THE LIABILITY APPROACH: SOME FALSE STARTS

In the cases and literature on the religious landlord/unmarried couple conflict, commentators have tended to commit four errors that are fatal to a satisfactory moral resolution of the conflict. One error is to deny the significance of the harm to each of the parties in the dispute if the other wins. The second is to deny the importance of the rights each party raises, or suggest the obvious superiority of one set of rights over another. The third error is to run straight for the law: for example, to assume that resorting to the Free Exercise Clause, or to the religious exemption in the Fair Housing Act, will automatically justify a result in the case, without considering the implications of such a result.

The final error, one which the remedies approach addresses most directly, is to assume that the law’s approach to the problem must be all or nothing. Either the state must exempt the landlord and thereby validate her religious beliefs, or the state must vindicate the couple’s civil rights and rain the entire remedial power of the state upon the landlord’s head. All four of these mistakes not only fail to resolve the Kulturkampf that Justice Scalia would

\textsuperscript{25} A number of the marital status discrimination cases have not involved solely moral issues, but have been based on the landlord’s views about the financial and social suitability of single tenants. See, e.g., Atkisson v. Kern Co. Hous. Auth., 130 Cal. Rptr. 375, 377 (Ct. App. 1976) (in addition to concern over morality, a landlord cited turnover of cohabitants, lack of cohabitant’s responsibility, and his poor influence on the tenant); Hess v. Fair Employment & Hous. Comm’n, 187 Cal. Rptr. 712 (Ct. App. 1982) (landlord cited financial considerations).

say is at the heart of these cases, but also fail to open a space for dialogue about what is at stake among the parties.

A. Error One: Only the Harm to One of the Parties Should be Taken Seriously

Refusal to acknowledge that significant harm is occurring to one party or another is often an easy way to approach rights versus rights conflicts in law. If the harm to one party is not great, his corresponding right can be taken much less seriously. This denial-of-harms approach is particularly attractive in the religious landlord/gay tenants struggle since the perspectives on each side of the conflict are so different. Mrs. Smith can hardly begin to imagine what her tenants are experiencing when she denies them an apartment any more than she can imagine why they choose the relationship they do. Nor can her tenants imagine how she could not see the insult to them, or in some cases, how she could believe in a religion that treats them with such disdain, or in a God who condemns rather than celebrates them as persons and their relationship. Indeed, each party has strong motivation to refuse to imagine the other’s pain, because the conflict is as much moral and social as it is a conflict of practical interests.

In the landlord/tenant conflict, the easiest way to discount the harm to Mrs. Smith is to treat it as largely a matter of money. In practical terms, the argument says, if a state enforces its civil rights statute on behalf of unmarried couples, Mrs. Smith’s easiest choice is to forego the opportunity to participate as an entrepreneur in the commercial economy. She can simply sell her boardinghouse or apartments to someone else and find another job where she is not forced to violate her religious beliefs, or use her property for some other purpose than a public rental facility. This argument makes much of the Supreme Court’s distinction between the highly protected right to intimate association—the right to decide whose lives will be closely intertwined with one’s own—and the lesser-protected social and economic associations, where one’s need for intimacy, warmth, and security is

---

27 See Romer, 517 U.S. at 636 (Scalia, J., dissenting); William N. Eskridge, Jr., A Jurisprudence of “Coming Out”: Religion, Homosexuality, Collisions of Liberty and Equality in American Public Law, 106 YALE L.J. 2411, 2413–15 (1997) (discussing the origins of the concept of Kulturkampf in German Chancellor Otto von Bismarck’s attempt to control and domesticate the Roman Catholic Church, and arguing that the most prominent examples of such Kulturkampf in the United States were the Court decisions in the Mormon persecution cases and in Bowers v. Hardwick, 478 U.S. 186 (1986)).

Indeed, the argument rests on the so-called public/private split: the notion that modern people inhabit two worlds—the private world of nurturance and protection, which must be shielded from both government and public interference; and the rough-and-tumble public world where marketplace survival rules and civil force governs. Mrs. Smith, her critics claim, can withdraw to her private world where the courts will protect her associational choices, and find another means of economic support if she wishes to follow her conscience.

Of course, in the original Civil Rights Act narrative, Mrs. Murphy’s boardinghouse was exempted in part because her story imagined people whose commercial ventures were of the close, intimate nature that the Court is describing in the right-to-intimate-association cases. Mrs. Murphy would be sharing bathrooms, meals, and daily company with those she boarded, as would tenants to whom she rented the other two or three apartments in her building. Moreover, Mrs. Murphy did not have any real kind of economic choice; she was an aging widow, whose only realistic means of income was to rent out her rooms. Thus, either the demands of the private world or economic necessity justified the leeway Mrs. Murphy was given to discriminate among boarders or tenants.

By contrast, those who would discount her cohort Mrs. Smith’s right to choose not to rent to unmarried couples are quick to embrace the public/private distinction as a way to minimize the interest which Mrs. Smith claims. Unlike Mrs. Murphy, most modern landlords—even those in owner-occupied buildings—are not likely to be cooking meals for their tenants, sitting around the fireplace with them, or doing their wash. Indeed, they may never see their tenants from day to day, sharing not even a dwelling entrance with them. If only very intimate associations count as a basis for protecting Mrs. Smith’s claim that she not be coerced into a relationship against her


31 See 114 Cong. Rec. 55 (daily ed. Jan. 15, 1968); 114 Cong. Rec. 2534 (daily ed. Feb. 7, 1968) (remarks of Sen. Mondale); Walsh, supra note 1, at 607 (quoting Sen. Mondale’s claim that the Mrs. Murphy exemption was aimed at those “who, by the direct personal nature of their activities, have a close personal relationship with their tenants.” 114 Cong. Rec. 2459 (1968). See also Sen. Hubert Humphrey’s point that “the [Mrs. Murphy] relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.” Walsh, supra note 1, at 608.

32 Walsh, supra note 1, at 609.
religious beliefs, as the Supreme Court's association cases may be read to suggest, Mrs. Smith is in trouble. An owner of four units, Mrs. Smith does not live in any of them, so her claim to interference with her intimate associational rights is implausible in this view.

Virtually all of the cases that have reached the courts do not involve major real estate moguls; they involve landlords with a few rental units who are trying to take some personal responsibility for their tenants, albeit initially through imposing behavioral rules on them. While in theory these landlords can simply exit the housing market if they do not like its rules, the personal investment they have made in purchasing, caring for, and renting out their housing is more than economic (though economically such units may literally represent their life savings). Most of these individual landlords have made an investment of their lives as well, an investment that, like a doctor's, requires them to be on call at all hours. It is an investment that requires them to make moral (and possibly sacrificial) decisions such as whether to trust a tenant who falls behind in the rent to pay next month, or to invest the energy to evict her, and whether to call a tenant on the carpet for troublesome behavior or simply not renew his lease. They have thus chosen to intertwine their personal lives to some extent within the close community of people who live under their roof, and the more public community in the neighborhood where their buildings are located, whether they are owner-occupied or not. Indeed, to discount Mrs. Smith's occupation as a landlady as merely commercial or economic is to discount the possibility that she may be...

---


35 See, e.g., Senior Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1036 (11th Cir. 1992) (holding that plaintiffs' right of association was not violated because such a right would "stop at the [plaintiffs'] front door").

36 See, e.g., Smith v. Fair Employment & Hous. Comm'n, 913 P.2d at 909 (refusal to rent duplex to unmarried couple engaged in sinful activity by person with five total units); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (1991), review granted and superseded by Donahue v. Fair Employment & Hous. Comm'n, 825 P.2d 766 (Cal. 1992), review dismissed and cause remanded by Donahue v. Fair Employment & Hous. Comm'n, 859 P.2d 671 (Cal. 1993) (landlord refused to rent rooms to unmarried couples in order to avoid cooperating in their sinful activity); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 277, 279 (Alaska 1994). But see, e.g., Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712, 715 (1982), superseded by statute as stated in Walnut Creek Manor v. Fair Employment & Hous. Comm'n, 267 Cal. Rptr. 645 (1990) (holding that the landlord's discrimination against single roommates, which was based only on financial considerations, was not a defense to a marital status discrimination claim, as the landlord could hold both roommates liable for the rent).
providing housing out of a sense of vocation, believing either that God has called her to provide homes for people or, more secularly, that she is trying to respond to an important social need using her particular talents and resources.\textsuperscript{37}

To honor the personal investment of a landlord in her properties and her tenants, of course, has a downside: the landlord might confuse her responsibilities to care with her need to invade her tenants’ legitimate autonomy. But the converse decision also has a strong downside: to discount such landlords’ interests as merely economic is to send the wrong message about the kind of local communities we may hope to have. That is, it may signal that we do not want landlords who are interested in their tenants’ needs or their tenants’ misbehavior, that we want landlords who are indifferent to who their tenants are as persons, whose choices will be based solely on economics.\textsuperscript{38} To discount Mrs. Smith as merely a commercial enterprise is to move farther along to the day when the engaged landlord disappears, and our only landlords will be large corporations with absentee managers who govern through rules rather than relationships, who ignore disruptive tenants and habitability issues until it hurts their bottom line. The blessing of anonymity is also its curse: the landlord who may murmur disapproval at an indigent woman’s poor choice in relationships is also the landlord who may fix the heat faster because she knows the woman’s children.

A second way in which Mrs. Smith may be discounted is to equate her religious beliefs with matters of private taste, following the modern assumption that religious matters are irrational, unprovable and therefore merely subjective.\textsuperscript{39} Such a move discounts the community character of most religious convictions—the religiously motivated Mrs. Smith is likely to be turning down an unmarried couple as she lives out her commitments to a religious community and to a divine Other as she understands them, rather than simply echoing an instinctive reaction to a tenant she does not understand or approve. In this way, her response may be quite different from a non-religious landlord, whose refusal may be echoed by disgust at what he perceives to be an unnatural relationship, or a lifestyle different from his

\textsuperscript{37} For example, the dissent in \textit{Smith v. Fair Employment & House Comm’n} makes much of the fact that Mrs. Smith was not a passive investor but actively managed her rental property, including personal attention to the process of selecting tenants. \textit{Smith}, 913 P.2d 947 (Kennard, J., concurring and dissenting).

\textsuperscript{38} See generally William A. Fischel, \textit{Voting, Risk Aversion, and the \textsc{NIMBY} Syndrome: A Comment on Robert Nelson’s “Privatizing the Neighborhood,”} \textit{7 Geo. Mason L. Rev.} 881 (1999) (discussing why landlords do not tend to object to further development in their neighborhoods as much as owners who occupy their real estate).

own. Indeed, the religious landlord may well struggle within her conscience, caught between teachings of her community which demand that she both "hate the sin" and "love the sinner." 40

To insist that Mrs. Smith keep her religious convictions entirely in the closet by outlawing them as a basis for reflection about whom she should choose as a tenant not only demeans her commitments and her internal struggles. It sends the message that people of religious and moral convictions should keep them quiet, not prophetically criticizing the evils they witness in society, whether individual or corporate. Moreover, to privatize her religious convictions may well reinforce her instinct that she is the victim at the hands of the state, that rights protecting her basic dignity are being stripped away for a trivial or even evil purpose. 41 Disregarding Mrs. Smith's convictions may reinforce the instinct of her religious community that it is now the persecuted minority, pushing that community to react aggressively toward other minorities, to unreasonably magnify those minorities' new "power" in the larger community and to strike out, even violently. This is at least one reading of the vengeful violence that met blacks in places such as Little Rock, when whites, forced to give up their privilege, imagined blacks' power as larger than life, recreated themselves as victims and retaliated, claiming to be avenging justice rather than protecting ill-gotten privilege. 42

Conversely, the harms that gay and lesbian couples suffer when Mrs. Smith denies them housing because of their relationship or sexual orientation are similarly not de minimis, and should not be treated as such. The economic impact of permitting small landlords to discriminate against gay and lesbian couples due to their religious beliefs has not been well documented. 43 Yet, any legal regime that purports to seriously consider the


41 See Villa-Vicencio, supra note 20, at 174–75.


predicament of both parties cannot afford to assume it is either minimal or
crushing any more than it can assume that Mrs. Smith can easily exit the
housing market. In some housing markets—particularly in rural areas with
few apartments or in expanding urban cores where housing is not being built
as fast as jobs are becoming available—the impact of widespread
discrimination by small landlords on the availability of housing may be
substantial.\textsuperscript{44} Indeed, perhaps one of the most compelling legislative
arguments for the Fair Housing Act was that morally brave landlords who
tried to rent to both blacks and whites were being ostracized or economically
harmed by their communities for doing the right thing.\textsuperscript{45} While communities
are not as closeknit as they were in 1968, landlords in some small,
homogenous communities may well fear that renting to gays and lesbians
will cost them socially and economically.\textsuperscript{46} Conversely, in other markets,
small landlord-owned housing may be dwarfed in both availability and
affordability by corporate complexes that have little religious reason to
discriminate.\textsuperscript{47} Local governmental efforts to get at real economic disparities

\begin{footnotesize}
\begin{itemize}
\item 114 CONG. REC. S2985 (daily ed. Feb. 14, 1968) (statement of Sen. Proxmire, noting that “in real life, it is quite costly—in dollars and cents—to be a reformer” and that “[n]o single developer or landlord can afford to undertake reform alone.”).
\item See generally Shades of Gay: With AIDS No Longer an All-Consuming Crisis, the Battle for Tolerance has Moved to Schools, Churches, Offices and the Frontiers of Family Life, NEWSWEEK, Mar. 20, 2000, at 46 (describing mixed tolerance and discrimination against gays and lesbians); Joseph S. Shapiro, Kids with Gay Parents as Lawmakers Battle Gay Marriages, a Look at How the Children Fare, U.S. NEWS & WORLD REP., Sept. 16, 1996, at 7576, 7879, available at 1996 WL 7811465 (describing taunts by classmates of children with lesbian or gay parents).
\item Corporations are more likely to be governed by a diverse board of directors who will have a variety of religious and moral perspectives on issues such as gay and lesbian couples and privacy. They are also less likely to be actually aware of a possible conflict between their religious beliefs and their economic interests since it is less likely that the unmarried status of a
\end{itemize}
\end{footnotesize}
existing in various housing markets through devices such as rent control, re-
 zoning, and even housing discrimination laws have demonstrated that context
do es make a difference in the nature of the harm being pressed. 48

Moreover, much as Mrs. Smith's decision to enter the rental market may
be, in part, a commitment to the kind of community she wants to live in, so
too the couple's decision to rent a unit in a traditional neighborhood may
evidence a commitment to forging a certain kind of local community, the
kind which can only emerge when strangers come to know each other over
time and over fences or coffee. The choice of a residence, like the choice of
a partner, is not appropriately equated to the choice of one's automobile or
other material goods. Even the choice of a short-term apartment may reflect
deep human needs for a place of one's own, for security, for self-expression
and care, and for creating a nurturing environment for one's family. 49
Indeed, it may express one's personal need for attachment to community: the
commitment to reach out and look out for those strangers whom geographical
proximity has thrown together. Property law has traditionally recognized the
non-fungibility of real property, particularly of a place one intends to make
his or her home. 50 While the interest of a couple who are simply looking at a
possible home is not easily comparable to a family who has a history of
couple may come to their attention. Moreover, even if the governing board was religiously
homogeneous, the likelihood that they would feel the same moral responsibility for their
corporate decision as they might for a personal decision to rent to a morally objectionable
tenant is diminished. Finally, a corporate landlord is more likely to hold economic
considerations in stronger regard than non-economic criteria regulating the choice of clients,
since individual discriminatory decisions not met by reciprocal discrimination by other housing
providers are against the economic interests of the discriminating party because they restrict
the pool of economically trustworthy tenants. Conversely, however, corporate landlords can
have a much more decisive impact on disadvantaged groups, not only because of the number of
current and future units they control, but because their practices may be copied by smaller
landlords who cannot invest the resources to determine what rental practices are legal or serve
their best economic interests.

48 See, e.g., Keith Aoki, Race, Space and Place: The Relation Between Architectural
Modernism, Post-Modernism, Urban Planning, and Gentrification, 20 FORDHAM URB. L.J.

49 See Bond, supra note 5, at 317, noting the uniqueness of housing as a commodity
(quoti ng David W. Bartelt, Housing the "Underclass," in THE UNDERCLASS DEBATE: VIEWS
FROM HISTORY 110, 119-20 (Michael B. Katz ed., 1993); Margaret Jane Radin, Property and
Personhood, 34 STAN. L. REV. 957, 959 (1982) (argui ng that some property such as a wedding
ring has personhood value because it symbolizes the intimate relationship between two people
and reminds one how she is enriched by the relationship).

50 See Radin, supra note 49, at 597 (argui ng that "to achieve proper self-developmen t—
to be a person—an individual needs some control over resources in the external
environment.").
experiences and a sense of security about their residence, feelings of attachment often arise naturally and quickly when someone has found his or her "perfect" place.

At the same time, context is equally important in understanding the limits of harm to the prospective tenant’s interest in shelter. To equate the harm in the denial of a stranger’s apartment with, for instance, the violation of one’s physical person or even one’s opportunity to work—indeed, to treat as equal all dignitary and practical harms that persons suffer because of their race or sexual preference—similarly seems to belie human experience.

More importantly, particularly for gay or lesbian couples, rejection by a landlord because of his disapproval of their most intimate relationship confers a stigmatic harm, which is not easily expressible or quantifiable. While the fear and shame that gay and lesbian couples experience from a stranger’s disapproval may not be as traumatic as a parent’s disgust that his child is gay or lesbian, like the experience of a person who is repeatedly shamed because of his race, the sheer number and combined weight of each small sting may push him or her to the emotional breaking point.51 And a shaming experience where one is most vulnerable—in her relationships with family and friends, work or home—may be particularly difficult due to the accompanying anxiety about the security of the future. If one landlord can turn a person down because he is gay, he has no way of knowing that the next landlord will see things differently, or the next, and that ultimately he will find a decent place to live.

In such cases of intimate association, where an individual’s very selfhood is partially constituted in relationship—where people may experience the best of who they are with another—a landlady’s rejection of the relationship may well be even more harmful than her rejection of the individual based on his or her sexual orientation. Indeed, the harm exacerbated by rejection of the relationship may be particularly acute precisely because one’s partner is also shamed. Even gays or lesbians who have learned to deflect shame leveled against themselves may be victimized by having to experience their beloved partner’s pain, and the feeling that they are powerless to remove that pain. Finally, for Mrs. Smith—or for the law—to reject a gay or lesbian couple’s commitment as sinful or odious is as much a sign of disrespect for her potential tenants’ conscience as her tenants’ insistence on forcing her to rent to them is disrespectful of her conscience.

It is the tragedy of a rights versus rights conflict that when rights are definitively assigned through a liability rule, rights are also taken away.

Unlike other cases in which the parties may have had no legitimate reliance that the state would protect them, when the state prefers the recognized human rights of one person over those of another, the state has simultaneously withdrawn the cloak of protection that in other cases the individual has come to rely on. In this case, both Mrs. Smith and the prospective tenant might have had reasonable expectations that the law would vindicate their conscience and equality rights over other economic and social interests; but when placed head to head, Mrs. Smith’s conscience rights cannot be vindicated without stripping her tenants of their equality rights. The losing party experiences not only the losses that come with traditional imposition of duties, but the loss of the state’s protection. Indeed, in a political culture that highly prizes civil rights and casts those who violate such rights into a deep moral and political hell, to tell Mrs. Smith or her prospective tenants that they are violating the other’s rights is to morally condemn them as well.\footnote{See Att’y Gen. v. Desilets, 636 N.E.2d 233, 237–38 (Mass. 1994) (suggesting that a claim that religious landlords are discriminating may stigmatize them); see also Knutson, supra note 12, at 1698 (describing Desilets).}

For lawmakers to acknowledge the complex and significant harms potentially faced by both parties in this conflict is not to require that they shut their eyes to more disheartening possibilities about both parties in the conflict, a concern I will address later. It is true that Mrs. Smith may not be such a nice religious woman, struggling with her conscience to make the right decision. She may simply be a mean-spirited, bigoted, selfish woman, who simply wants to exercise her property power to revictimize tenants who belong to vulnerable groups, to shame them as persons because they disgust her or fail to conform to her rigid personal view of the world. Conversely, her prospective tenants may not be a committed couple conscientiously trying to live out a virtuous life in the face of legal obstacles to traditional commitment. They may be self-involved individuals living together because it suits their immediate self-interest. The only reason for such tenants to batter Mrs. Smith with the civil rights law may be that they do not want anyone pointing out their moral vacuity, or that they are morally childish, unused to taking “no” for an answer. Moreover, even if Mrs. Smith or her tenant is well-meaning, their benign motives may not meaningfully assuage the damage that the other experiences when his rights and interests are legally extinguished, a damage which may affect the public as a whole as well as these individual litigants.

Neither the virtues nor the vices of a Mrs. Smith or the Joneses can be distinguished in a simple legal or constitutional rule that abstractly prefers the rights of one to the other. Only the thick description that fact-finding affords can even come close to describing the harms and judging the “sincerity” of either party. A civil rights law can respond to a summary of many people’s
experiences by suggesting that one party is more likely to be vulnerable to
the harm occasioned by private persons or the state and will therefore need
rights, but a rule cannot account for those cases that defy the generality,
where the tables are turned. Only an encounter between the parties in the
presence of a mediator, arbitrator or judge/jury is likely to expose and
distinguish invidious and conscientious, harmful and harmless action.

It is also true that no legal remedy may assuage the real damage to either
dignitary, or the more tangible, harms that either person experiences in this
case. But to say that the law cannot make someone whole is not to say that
the law must trivialize the harms it seeks to acknowledge.

Indeed, a useful purpose of legal process, one that is most explicitly
recognized in mediation, is to allow people to express the pain they feel to
those who have harmed them, even when that harm cannot be fully erased.53
Particularly when a legal conflict involves dignitary concerns that so closely
touch the individual and so clearly express social values, the expression of
harm must be an important part of the process.54

B. Error Two: Resorting to Positivism

A second false start in resolving Smith v. Jones is the resort to
positivism, in this case, to an abstract resolution of the conflict between
statutory and constitutional law. One move is a simple syllogism:

1. Constitutions trump statutes55 (or federal law trumps state law).56

2. Religious freedom is a constitutional (federal) right57 while the right
to nondiscrimination on the basis of marital status or homosexual
orientation is a statutory (state) right.

3. Therefore, Mrs. Smith’s constitutional free exercise right trumps the
Joneses’ statutory right to nondiscrimination.

Second, courts may attempt to resolve the dispute by application of the
Sherbert rule,58 either as a proposed interpretation of a particular state

53 See Mark S. Umbreit, Humanistic Mediation: A Transformative Journey of
54 Id. at 203 (describing the “genuine empowerment and mutual recognition of each
party’s humanity in addition to the value of compassionate strength among parties in conflict
that arises from humanistic or transformative mediation” and the ability for parties to “expand
their perspective . . . to include an appreciation for the circumstances that the other person is
faced with”).
56 See, e.g., Cooper v. Aaron, 358 U.S. 1, 16–19 (1958).
57 See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S.
205 (1972).
58 Sherbert, 374 U.S. at 407.
constitution or, pre-Boerne, as an application of the Religious Freedom Restoration Act. This more complicated analysis proposes:

1. Mrs. Smith has a sincere religious freedom claim and either:
   a. she does not suffer a substantial burden—hence, she suffers no constitutional harm and the Joneses win. (Here, the most frequent reason given for finding that she is not burdened is that she is not forced to be in the housing market, or has a free choice between being a landlord under terms that violate her conscience or going into another line of work).
   b. she does suffer a substantial burden. (Here, courts and commentators have argued that forcing Mrs. Smith to choose between her religious conscience and her rights to utilize her property is an unacceptable choice).

3. If Mrs. Smith does suffer a substantial burden, then either:

59 See, e.g., Cooper v. French, 460 N.W.2d 2 (Minn. 1990); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska).
60 Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 921–24 (Cal. 1996). RFRA was also raised in the lower court prior to City of Boerne v. Flores, 521 U.S. 507 (1997), in Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 697 n.4 (9th Cir. 1999), withdrawn, 192 F.3d 1208 (9th Cir. 1999), on reh'g, 220 F.3d 1134 (9th Cir. 2000), available at 2000 WL 1069977. (The opinion in Thomas was withdrawn on the basis that the case was not yet ripe, since the landlords had not denied any specific proposed tenants the right to housing after passage of the state law.) The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to 2000bb-4 (2000), was passed in response to the Supreme Court's decision in Employment Div. v. Smith, 494 U.S. 872 (1990), in order to restore statutorily the Sherbert compelling state interest test in religious freedom cases, but was held unconstitutional in City of Boerne v. Flores, 521 U.S. at 515.
62 The Swanner court, for example, held that the landlord must show that religion is involved, that the conduct in question is religiously based, and that the claimant is sincere in his or her religious belief. Swanner, 874 P.2d at 281,
63 Swanner, 874 P.2d at 283; Smith, 913 P.2d at 95; McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998), vacated in part, 592 N.W.2d 545 (Mich. 1999); see Markey, supra note 43, at 814–81 (suggesting the difficulties of permitting a religious exemption for commercial businesses).
64 See Thomas, 165 F.3d at 712–14; Att'y Gen. v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994); Hernandez, supra note 43, at 552. See also Clegg, supra note 4, at 1610–11 (arguing that discrimination based on familial status or marital status does not pose the same social harm, requiring a federal response, as race discrimination).
a. the state has no compelling interest in eradicating discrimination on the basis of marital status, therefore Mrs. Smith wins. (Here, courts have found that the state's interest in marital status discrimination, while important, does not rise to the compelling level of eradicating gender or racial discrimination, because marital status discrimination is much less invidious, because it is not based on status but conduct within the victim's control and thus is much less harmful to the individual and society), 65 or

b. the state has a compelling interest in eradicating such forms of discrimination as the Joneses have experienced. (Here, courts have suggested that they should defer to legislative determinations that marital status discrimination is on a par with other compelling anti-discrimination interests, as can be implied from its inclusion in the state nondiscrimination statute). 66

4. If the state has a compelling interest, then either:

a. the state has used the alternative which is least restrictive of Mrs. Smith's religious freedom, the Joneses' win and Mrs. Smith must provide them housing or pay damages; 67 or

b. the state has not used the least restrictive alternative, 68 so Mrs. Smith wins.

---

65 See, e.g., Thomas, 165 F.3d at 714–17 (noting that there has been no "firm" national policy against marital discrimination and that "not all discrimination is created equal"); Markey, supra note 43, at 788–801 (discussing the nature of the harms to the state and individual of marital status discrimination). See also Swanner, 874 P.2d at 281 (noting that no exemption would be given if it would pose a substantial threat to public safety, peace and order or there were a compelling state interest of the highest order); Rebecca Wistner, Note, Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws, 46 CASE W. RES. L. REV. 1071, 1103 (1996) (discussing compelling interests in tenants' privacy and intimate association, in providing tenants with housing, and regulating secular commercial activity).

66 See, e.g., Smith v. Fair Employment and Housing Comm'n, 913 P.2d at 915–18 (deferring to administrative commission and to plain meaning and legislative intent); Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1201–02 (Alaska 1989) (noting the clear legislative intent to cover unmarried couples); McCready, 586 N.W.2d at 725 (noting clear legislative intent to protect couples by including marital status in statute).


68 Wistner, supra note 65, at 1110–11 (arguing that refusal to allow a religious exemption from the fair housing act may or may not be the least restrictive means, depending on the state interest which is most important).
The major positivist difficulty with this form of legal argument is that both the Joneses’ statutory claim and Mrs. Smith’s religious freedom claim rest on very fragile positivist grounds at the moment. The Joneses’ right to non-discrimination is still emerging in state laws. Numerous states do not explicitly recognize sexual orientation to be a prohibited basis for discrimination. In some states, majorities have vigorously opposed such recognition in broad-reaching legislation such as Colorado’s Amendment Two as well as more narrowly focused statutes such as little-DOMA acts.

Moreover, the Supreme Court’s recognition that individuals have the right not to be treated invidiously because of homosexual status is lukewarm at best. The Romer Court applied only rational basis scrutiny to a wide-ranging constitutional amendment that the Court found was hard to read as anything but an invidious attempt to strip basic rights of citizenship from gay and lesbian people based solely on their sexual orientation. Its clarity and “sheer breadth” were an easy target for the principle that government must at least govern impartially. The baggage of other federal constitutional cases involving gay and lesbian people remains. Bowers v. Hardwick, for example, cuts directly into the Joneses’ claim that they have a constitutional right to be respected as a couple on the same basis as heterosexuals.

---

69 See, e.g., County of Dane v. Norman, 497 N.W.2d 714, 714 (Wis. 1993) (local ordinance). According to Battaglia, supra note 40, at 224, only ten states and the District of Columbia protect against sexual orientation discrimination by nongovernmental persons, and only nine of these protect against housing and economic discrimination.

70 Colorado’s Amendment Two, which provided that no state or local governmental unit may “enact, adopt, enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis to entitle any person or class of persons to have or claim any minority status, quota preference, protected status or claim of discrimination,” COLO. CONST. art. II, § 30(b), was held unconstitutional by the United States Supreme Court in Romer v. Evans, 517 U.S. 620, 623 (1996).

71 A number of states have followed the lead of Congress in passing the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2000) (which permits states to deny full faith and credit to other states’ recognized marriages between persons of the same sex, and defines marriage for purpose of federal benefits as a relationship between two persons of opposite sexes). See, e.g., ARIZ. REV. STAT. § 25-101(c) (West 2000); GA. CODE ANN. § 19-3-3.1 (Harrison 2000); IDAHO CODE § 32-209 (1999); MINN. STAT. ANN. § 517.03 subd. 1 (a)(4) (West 2000); WASH. REV. CODE ANN. § 26.04.010 (1) (West 2000).

72 Romer, 517 U.S. at 632–33.

73 Id.

74 Id. at 633; Battaglia, supra note 40, at 234–35.

75 478 U.S. 186, 189 (1986) (holding that the state may prohibit consensual sodomy between two people of the same sex, while reserving the question whether the state might apply the sodomy statute to married couples or others).
While marital status nondiscrimination laws have quietly but steadily been increasing, the Joneses’ right not to be discriminated against based on their marital status is not very strong right now. Only a large handful of states protect people against “marital status” discrimination. In only a few of them have courts held that “marital status” includes discrimination against the marital status of the couple, rather than of an individual tenant. Moreover, the reported cases have mostly involved heterosexual couples; and it is unclear whether the state courts will extend their reach to gay and lesbian couples, given the Supreme Court’s crabbed reading of the right to privacy for homosexuals in *Bowers.* Some state courts have interpreted their statutes as lacking evidence that legislatures meant to protect unmarried couples under the marital status provisions. The Minnesota courts, for instance, decided that the legislature could not have meant to protect a relationship which is criminalized under the state’s existing fornication statute. Yet in other states, legislatures and courts have specifically

---


79 *Compare* Cooper v. French, 460 N.W.2d 2, 10 (1990); McFadden v. Elman Country Club, 613 P.2d 146,150–51 (1980) (a “person” must mean one person, not a relationship); *and* County of Dane v. Norman, 497 N.W.2d 683, 689–90 (Wis. 1993) (finding that a policy of encouraging marriage militates against the construction of marital status to include unmarried relationships); *with* McCready v. Hoffius, 586 N.W.2d 723, 727–29 (Mich. 1998), *vacated in* (continued)
exempted Mrs. Smith from having to comply with “marital status” discrimination prohibitions because of privacy.80

However, Mrs. Smith fares little better as a matter of positive law. The Supreme Court’s current reading of the Free Exercise Clause, in Employment Division v. Smith,81 permits a state to enforce a neutral, generally applicable law such as the marital status nondiscrimination statute even when it substantially burdens the religious rights of Mrs. Smith and forces her to violate her conscience.82 Thus, absent more successful federal legislation replacing RFRA,83 unless Mrs. Smith lives in a state where the courts follow the Sherbert interpretation84 of its own state constitution, she will have no cause for complaint against legislation protecting unmarried couples through “marital status” or sexual orientation nondiscrimination laws. The Supreme Court’s holding in Smith says she has no Free Exercise right, and therefore no constitutional (federal) right, to trump the Joneses’ statutory (state) rights in the original syllogism.85
The positivist approach does have some possible virtue in this case, though it is not the one that might be assumed. The oft-stated value of positive law in settling rights determinations is that it is relatively clear and easy to apply, and therefore provides fair notice to people about their legal duties and rights. Moreover, it precludes the need for courts to re-think the question of which right is more important to the electorate or the civilization, since the legislature (or constitution) has settled that question. Thus, the positivist approach seems to obviate the need to ask the perennial jurisdictional question: should courts have the right to interpret law according to some moral universe not embodied in the plain letter of the law, whether it is their own moral universe, the electorate’s, some American moral tradition, or some universal law?

Jones v. Smith immediately undercuts positivism’s premise of simplicity and clarity. On the Jones side of the “v,” the courts must interpret the law using someone’s values: they must determine whether “marital status” was meant to cover unmarried couples (particularly gay and lesbian unmarried couples) with usually little guidance from state legislatures on that point. On the Smith side, assuming that Smith is arguing from her state constitution and not a specific statutory exemption, the courts must minimally decide what “substantial burden,” “compelling interest” and “least restrictive alternative” should mean, assuming that they simply take Mrs. Smith’s sincerity for granted. Thus, they must still cull the history, prioritize and refine definitions of the values that are at the core of constitutional and statutory religious freedom protections. In this case, the positivist approach

---

86 See John Nowack & Ronald Rotunda, Constitutional Law (5th ed. 1995)
87 In this particular context, see Hernandez, supra note 43, at 565–66 (arguing that a minority of judicial activists and commentators “believe here is nothing wrong with fornication and unmarried cohabitation and they want the state to punish those who sincerely disagree with them”).
90 See Johnson, supra note 89, at 367 (noting that the sincerely held religious belief of landlords has not been challenged in any case).
largely fails to avoid the problem of judicial competence and jurisdiction to decide the hard questions that the morality of civil rights disputes.

The Swiss cheese that Smith v. Jones makes of positivism, however, turns out to be something of a virtue. What the left hand taketh away in terms of clarity, notice, and easy application, the right hand giveth in the possibility for a dialogical resolution of Smith v. Jones. The lack of clarity about the priority of civil rights puts both Mrs. Smith and the Joneses on notice that their contemporary community and their traditional polity may well disagree with their individual beliefs that their rights are absolute and autonomous, not dependent on consideration of the rights of their neighbor. Since they cannot be certain about their own rights, they cannot, in the community’s presence and with its blessing, make a triumphalist claim that they are by clear consensus on the side of the angels and their opponent has sold out to the devil. (Of course, one human response to legal uncertainty is to be even more defensive about the rightfulness of one’s claim; the vagueness of each person’s rights may cause him or her to all the more stubbornly insist on them as a defense mechanism.) Moreover, these rights are put on the table for private discussions about the possibility that either Mrs. Smith or the Joneses might be wrong in insisting on their rights. They are put on the public table for a more extensive discussion about whose concerns are most compelling, which may possibly impel a public response that addresses both concerns in a more creative way than the rights versus rights battle can produce.

C. Discounting Rights

A third, related false start in the Smith v. Jones conflict is to mischaracterize or discount the fundamentality of the rights which one side or the other asserts, or in other words, to throw up one’s hands and say, “incommensurable, can’t be measured against each other, so the only neutral value is ‘choice’.” In this move, religious freedom is, for some, really not that important when the equality principle conflicts with it; or conversely, an individual’s experience of unequal treatment (even if unjust) is hardly the equivalent of forcing someone to act against her conscience. Although the instinct to compare rights in this fashion bespeaks a good faith effort to resolve the dispute instead of side-stepping it, like the move to compare harms, the rights-comparative move will be false unless it compares rights more thickly, more concretely, and in a more complex way than most court cases or law review articles do. Indeed, the rights comparison also has to resist the attempt to stay with stereotyped rights categories, exploring the

---

91 See, e.g., GEDICKS, supra note 39, at 13.
factual territory and being prepared to recognize when rights are of the same kind, which may well be true in this dispute.

Strategically, from either a traditional liberal or progressive perspective, the move to compare two rights against each other on an abstract basis can bring no good to individuals and polities who care about human rights as an important line of defense against the power of bureaucracies, state or private. To denigrate or make light of one of these rights, such as the nondiscrimination right or the right of religious conscience, may have the short-term appeal of resolving the immediate controversy. However, the long-term impact of such a strategy is to suggest that fundamental rights are not sacred, even in the secular sense of the word in which they inhere in a person simply because of his humanity and cannot be alienated. If fundamental rights are treated as equivalent to one’s personal interest in the stock market or sitting on a beautiful beach sipping daiquiris, it is quite easy for courts whose sensibilities have been deadened to their critical necessity in bleak times of government despotism to simply let them slide in times of less obviously wrongful government actions. Thus, for example, the indifference of government to the plight of the needy which expresses itself in summary action to terminate their means to buy food and shelter may seem not so awful to a court that has conceded that the right to be heard is a nice right, but not a fundamental human concern given the state’s immediate budget crisis. The false starts of discounting the importance of basic human rights, or confusing human desires with rights, or even giving up in the name of “incommensurability” are easy false starts in a legal system shaped by largely by modernity. The modern understanding of truth, and thus of right, is based on what we might think of as the scientismic model of truth. In the scientismic model, truth is based on some verifiable reality. In a pure scientismic model, truth can be neither contradictory or uncertain, so that if two assertions about reality appear to conflict, one must be false and the other true, or both false. As Bertrand Russell would argue, if one cannot

---

96 Gedicks, supra note 39, at 31; see also Gary Minda: Postmodern Legal Movements: Law and Jurisprudence at Century’s End 13–15, 20, 22 (1995) (describing Langdell’s “faith in the powers of science and reason to uncover universal truths and law as a system that satisfied the legal norms of objectivity and consistency” in opposition to modern theories that utilize a “set of conflicting and paradoxical abstract propositions” about reality).
certainly prove the truth of an assertion, one is impelled to doubt it.\(^7\) In the modern legal system, this has come to mean that conflicting rights cannot co-exist in the same time and space, because they express a conflict about the "truth" of the human condition, and "truth" cannot possibly be self-contradictory or paradoxical.

This "scientismic" understanding of truth as a key ingredient in the recognition of human rights may lead in several different directions. First, one might claim that these human "rights" are not both rights; one is *really* a right, and the other simply an interest, a matter of personal preference.\(^8\) As I have suggested, in the landlord-tenant dispute, this is indeed the tenor of the conversation—landlords only have an economic interest, or tenants only have a social interest in this particular apartment. Second, rights arguments may assume that there is some "scientific" way to compare rights—that there is, like a periodic table of elements or an economic analysis, some way to assign weight to rights, to put the right to equality "higher" or assign it more "points" than the right to association or religious freedom, or vice-versa. Some attempts to describe religious freedom as a "first" freedom\(^9\) stem from this "scientismic" perspective on truth and rights. First in time, first in right becomes a legitimately "objective" way to assign value priority, one that will set the proper place of a right in the list. Similarly, attempts to prioritize rights try to quantify how many people are affected by the right on one side or another, often under the disguise of a moral argument for democracy.\(^10\) For example, the argument that banning school officials from sponsoring prayer in the public schools violates the rights of the majority and is thus unconstitutional\(^11\) may be just such an attempt to quantify rights. Ironically, utilitarian or law and economics attempts to take this concept seriously and put it out on the table by assigning economic value to rights\(^12\) are

\(^8\) Compare, e.g., Hernandez, supra note 43, at 499 (arguing that landlords have a right and that the right of unmarried cohabitants is "as illusory as the emperor's new clothes") with Markey, supra note 43, at 817 (suggesting that exceptions for religious business owners would permit business "to cloak discrimination in the shroud of free exercise of religion").
\(^9\) Not all uses of this term, however, make this value assumption. As just one example, James Wood, who has often used this term, has made more foundational arguments for its priority. See generally, James E. Wood, Jr., The Relationship of Religious Liberty to Civil Liberty and a Democratic State, 1998 BYU L. REV. 479.
\(^12\) See Minda, supra note 96, at 98–99.
considered amusing or impractical, even though such approaches take these scientistic notions of truth and rights to their logical conclusion.

Finally, in what has become almost postmodern boilerplate, one might conclude that if courts cannot establish one right to be true or more valuable than another with any certainty, law's only hope is to announce that rights are "incommensurable." In one version of this argument, both asserted "rights" must merely be a matter of the contestants' personal preference or a personal taste which has little to say about critical common issues of human existence and meaning. In another, both asserted rights are so profound, and so profoundly disturbed in a concrete human conflict, that there is no possible way to bring them down to size sufficiently enough to resolve a dispute without permanent damage to value itself: equality writ large is always at stake in a discrimination case; conscience in a religious freedom case. In a system in which rights cannot logically conflict because truth cannot logically be multiple, the state may vindicate both claims only by resorting to positivism or the minimalist state. That is, law can only ask whether a choice of rights was passed through the proper process (mostly majoritarian) or must prefer the "neutral principle" of human autonomy, which protects individual rights not on their own merits but as expressions of singular human preferences and desires, insisting that the state stay out of regulation unless it can come forward with a "scientific" reason for doing so.

In one sense, the religious landlord/gay tenant debate has largely been played out on this constitutional battlefield of human autonomy. On the tenant's side, those who would demand that Mrs. Smith admit unmarried tenants or be held in violation of the state’s human rights laws argue that Mrs. Smith's refusal invades their right to choose their sexual partners and practices, to choose the person to whom they want to be intimately related.

103 Id. at 213–14 (discussion of Owen Fiss' view that law and economics claims were based on "crude instrumentalism" that would lead to the "relativization of all values").
104 See Frederick Schauer, Instrumental Commensurability, 146 U. Pa. L. Rev. 1215, 1216 & n.3 (1998) (noting that often the metric assumed is monetary, but that it need not be; arguing that the fact that values are incommensurable (e.g., not reducible to a common metric) does not mean that they are incomparable (e.g., that they cannot be viewed as better or worse than each other)).
105 See, e.g., Gedicks, supra note 39, at 12, 32, 110–11, 109–12; Minda, supra note 96, at 88–89, 94, 241 (description of law and economics movement).
106 But see Frederick Schauer, Commensurability and its Constitutional Consequences, 45 Hastings L. J. 785, 792–93, 802 (1994) (arguing that even if one ideally believed in rights incommensurability, one might want to operate as if rights were commensurable because it would make solutions possible rather than encouraging people to give up on social problems).
107 See Minda, supra note 96, at 96 (discussing the interest group pluralism theory).
108 See id. at 37–43 (discussing the neutral principle theory).
and to choose a home where they can live this chosen lifestyle.\textsuperscript{109} On the autonomy battlefield, gay and lesbian partners are indistinguishable from heterosexual partners on this score, for the rights of intimate association are premised on the notion that the state has no right to dictate action or choices of intimacy to any person.\textsuperscript{110} Although some would argue that the harm of denied rights falls more heavily on gay and lesbian partners than on heterosexuals since gay and lesbian partners cannot choose to avoid the harm by marrying, others would argue that any preference for the intimate choices of gay and lesbian partners over straight couples would be based upon a moral judgment that the state is not entitled to make about intimate associations.\textsuperscript{111} In part, that is because in judging whether, for example, marital intercourse is morally superior to casual intercourse, a pluralistic state cannot construct a principle for judging that can be indubitably proven and therefore (in the modern model) serve as a basis to coerce or even evaluate human behavior.\textsuperscript{112}

On the battlefield of autonomy, the religious landlord’s claims would similarly not be open to scrutiny to determine either their sincerity or their validity, for one person’s freedom of (religious) choice is to him just as precious as another’s.\textsuperscript{113} Not only is religion private, but what may seem to common sense as Mrs. Smith’s extreme or aberrational belief that homosexuals are evil freaks of nature cannot be distinguished on “objective” grounds from another Mrs. Smith’s religious belief that many gay relationships involve men who use each other only for personal satisfaction rather than cherishing each other in love, and that she should be discouraging such relationships out of concern for men’s souls.\textsuperscript{114} Most postmodern theories do not resolve this dilemma. In place of the “either-or” scientism of the modern view of religion and moral beliefs, they substitute the notion that human persons, their values, and their relationships are merely matters of cultural construction, again immune from criticism because there can be no

\begin{itemize}
  \item[\textsuperscript{110}] Id.
  \item[\textsuperscript{111}] See id.
  \item[\textsuperscript{113}] GEDICKS, supra note 39, at 32.
  \item[\textsuperscript{114}] See id. at 30 (arguing that identification of religious knowledge with subjectivity means that the government may make value judgments based only on secular “objective” constructions of reality).
\end{itemize}
objective “proof” of the superiority of one cultural construction over another.115

Even if this civil rights battle is moved to another ground, the fight over human dignity, the postmodern dilemma does not disappear. If all values are culturally constructed and situated and none can be proven more “true” than another, then the debate about whether Mrs. Smith’s humanity and dignity are more violated by forcing her to rent against her conscience than her tenants’ dignity is violated by their being shamed and denied a home is similarly irresolvable. Unless, of course, the majoritarian or marketplace solutions are resolutions; but human rights advocates, no matter which rights they advocate, have been implacably committed against majority political rule or economic coercion as appropriate resolutions to the question of human rights.116

Michael McConnell, for one, has proposed another option, at least in respect to religious rights. He argues for abandonment of the Free Exercise imagination, which focuses on individual liberty, choice, and personal fulfillment, all more reminiscent of the value of human autonomy than of human dignity per se.117 Rather, he argues for a return to an original understanding that religious liberty embodies the state’s recognition of the believer’s conscience, the notion that the believer’s dissent comes from his or her responsibility to the Divine.118 Decrying an individualist view of religion, McConnell calls for a return to Madisonian understandings of the dual claims of the two sovereigns, Lord and state, upon the human conscience:

Far from being based on the “respect for the person as an independent source of value,” the free exercise of religion is set apart from mere exercise of human judgment by the fact that the source of value is prior and superior to both the individual and the civil society. The freedom of religion is


116 But see Gardbaum, supra note 115, at 1688–89 (arguing that incomparability of values does not give any more justification for entrusting the choice of values to elites than it does to majorities).


unalienable because it is a duty to God and not a privilege of the individual. The free exercise clause accords a special, protected status to religious conscience not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual’s control.\textsuperscript{119}

Thus, far from being a matter of the religious believer’s taste, the exercise of religious dissent acknowledges a chosen relationship of surrendered freedom which impels the believer to say, “we must obey God rather than men.”

In this founding vision, according to McConnell, the “must” is the critical turn of phrase in this demand.\textsuperscript{120} It captures the ideal of “soul liberty,” that “the only way that unregenerate man can come to faith and salvation is through the intervention of God”\textsuperscript{121} and that “each person is free to pursue the good life in the manner and season most agreeable to his or her conscience, which is the voice of God.”\textsuperscript{122} McConnell hopes to return to the founders’ conviction that none of us can know what the divine calls each person to know, feel, believe or do.\textsuperscript{123} His argument would recall the founders’ demand for the necessary humility human governors must exercise in light of the reality that their own religious experiences are, at best, partial, and that their power to force a violation of another’s conscience is a deliberate slap in the face of the divine who ordained and nurtured that conscience.\textsuperscript{124}

Moreover, this sense of religious freedom captures a mood of public acknowledgment that, as a matter of fidelity to a gracious Other, the believer is as inexorably drawn to responsive obedience as a child is drawn to respect her parents’ expectations created out of love for her well-being, even when that obedience entails suffering imposed by a hard-hearted community. Moreover, to force such persons to refuse to give such obedience is to force them to be inauthentic—a hypocrite in Jefferson’s terms in the Bill for Establishing Religious Liberty—to force them not to be the persons whom

\textsuperscript{119} McConnell, Origins, supra note 117, at 1497; see also McConnell, God is Dead, supra note 118, at 169, 170.
\textsuperscript{120} See McConnell, Origins, supra note 117, at 1496–97 (quoting Madison’s Memorial and Remonstrance); McConnell, God is Dead, supra note 118, at 170–71.
\textsuperscript{121} McConnell, God is Dead, supra note 118, at 170.
\textsuperscript{122} Id. at 171.
\textsuperscript{123} See McConnell, Origins, supra note 117, at 1498–99; McConnell, God is Dead, supra note 118, at 167–71.
\textsuperscript{124} McConnell, God is Dead, supra note 118, at 167–68; see McConnell, Origins, supra note 117, at 1497–98.
they were called to be by the Divine.\textsuperscript{125} Or to use a Madisonian metaphor, to force compliance against conscience, particularly in religious observance, is to invade the jurisdiction of the Universal Sovereign.\textsuperscript{126} It is to disrupt the divine design for human community and history.\textsuperscript{127}

McConnell’s return to the original vision expressed by both Jefferson and Madison in core foundational documents is a compelling one, except perhaps to those who do not accept the possibility of the religious base on which it is founded. For one who demands that the state recognize that there is no God, the notion that a believing citizen can act out of a sense of loving obligation in violation of state law may seem impossible, for the relationship which compels the violation cannot exist. However, for those who concede that the state’s agnosticism about the existence of the Divine is most likely to preserve religious equality and mutual recognition in a highly religiously pluralistic culture, an expectation that the state proceed as if the religious believer could be—though she need not be—telling the truth that she is impelled to act out of this external relationship is no more religiously partial than expecting the state to assume that the religious believer is “sincere” when she claims she is motivated by religious belief. Like a person’s sincerity, a relationship with the Divine is not provable by any means that all inquirers in a religiously pluralistic world would accept as indubitable—not by science, reason, or experience.

Thus, the state’s decision to proceed as if a believer’s relationship with God (or a non-believer’s lack of one) could be, but not that it must be, true is at least as likely to produce a religiously “neutral” or “equal” response to both religious and atheistic beliefs as any other set of assumptions. Moreover, the state’s willingness to recognize the possibility of the believer’s relational obligation (as well as the equal possibility of its nonexistence) best meets the political exhortation of the framers that those who exercise power should similarly be persons of the deepest humility about the limits of their knowledge about the true and the good.

However, the framers’ argument must be recognized not only on behalf of Mrs. Smith, but also for her tenants in this debate, as a matter of religious equality and human dignity, another value protected by the non-discrimination principle. The framers’ message is that there are no


\textsuperscript{126} James Madison, Memorial and Remonstrance Against Religious Assessments, 1785, in ADAMS & EMMERICH, supra note 125, app. 1, at 105; McConnell, God is Dead, supra note 118, at 167–69.

\textsuperscript{127} Thomas Jefferson, A Bill For Establishing Religious Freedom, 1785, in ADAMS & EMMERICH, supra note 125, app. 1, at 110.
compelling grounds on which to argue that Mrs. Smith's religious vision is any more true than her prospective tenant's, if it is truly borne out of relationship with the Divine and not simply on autonomous law. That is, though Mrs. Smith may argue that she is following the law "written on her heart," the founders' message is that governors can say with no certainty that the law written on her heart will be identical to the law written on her prospective tenant's heart. Governors must admit the reality of this "religious" experience of the other, even if the tenant would not immediately describe his or her sense of compelled obedience to conscience in traditionally religious terms—that is, even if the tenant would not say (in Mrs. Smith's religious language), "God tells me (directly, through God's Word, or otherwise) that I have an obligation to live with and care for my partner."

This re-visioning of the conflict as a conflict of consciences has seemingly escaped the notice of most who are balancing the rights and harms in the Mrs. Smith-Jones conflict. They overlook the fact that the commitment gay and lesbian couples have toward each other may well have developed from precisely the same kind of communitarian virtues and even religious commitments that inspire Mrs. Smith to turn down her prospective tenant for conscientious reasons. Even those who have argued for parallels have not quite captured, in my view, what may be at stake for both the couple and Mrs. Smith. William Eskridge has gone perhaps farthest, arguing that those who identify with religious and sexual communities have both common community and personal characteristics. As communities, religious and sexual "nomic subcommunities"

have value-laden visions for the lives of their members and for the larger society as well. They tend to be . . . people bonded by associations that preserve and develop a common normative heritage. Nomic communities have a vision of what is ethically right. That evolving vision constitutes an internal law that guides the lives of their members . . . .

Both [religious and sexual orientation] are characterized by bonding with a cohort of people linked by similar emotions

---

128 See McConnell, Origins, supra note 117, at 1498–99, McConnell, God is Dead, supra note 118, at 169–70; James Madison, Memorial and Remonstrance Against Religious Assessments, 1785, in ADAMS & EMERICH, supra note 125, app. 1, at 104. For a discussion of the Protestant idea that law of the "golden rule" is written on the hearts of all persons but that human beings are consistently disobedient, see GEORGE W. FORELL, THE PROTESTANT FAITH 36–41 (1960).

129 Eskridge, Coming Out, supra note 27, at 2416–17.

130 Id. at 2413.
and belief . . . [and] institutionalized, albeit in different ways . . . .

As identifiers of human individuality, "Religious and sexual orientation . . . are identities based upon beliefs, feelings, cognitions and emotions . . . . [they are] dependent upon the ability and willingness both to express the identity and to engage in activities characteristic of the identity . . . . Both are spiritual as well as moral . . . ."\textsuperscript{132} Eskridge argues that neither identity is either completely voluntary or biologically predetermined, but rather that each comes from "feelings we do not consciously process or understand."\textsuperscript{133}

I would extend Eskridge's understanding, both of the "nomic community" from which a gay and lesbian couple come, and of the nature of the individual right that they seek to uphold in their conflict with Mrs. Smith, which does not necessarily differentiate them from Mrs. Smith, even if they do not hold to traditional religious views.

Even if it is true that the "nomic [gay/lesbian] subcommunity" has "value-laden visions for the lives of their members and for the larger society" and is "bonded by associations that preserve and develop a common normative heritage,"\textsuperscript{134} Eskridge acknowledges elsewhere that many, perhaps most, gay and lesbian people participate in many other "nomic subcommunities" which probably look more like Mrs. Smith's nomic communities than differ from them.\textsuperscript{135} In addition to traditional religious communities, where they are well represented, even though sometimes underground and sometimes in "renegade" congregations,\textsuperscript{136} gay and lesbian family members participate in moral/social communities that surround their workplaces, their children's schools, the causes they espouse and the interests they pursue in their non-working hours.\textsuperscript{137} There is no immediate reason to suppose that the public communities that shape their consciences differ in kind from those that shape Mrs. Smith's, even accepting the radically

\textsuperscript{131} Id. at 2419–20.
\textsuperscript{132} Id. at 2417–19.
\textsuperscript{133} Id. at 2419.
\textsuperscript{134} Id. at 2413. Eskridge's report seems consistent with what other authors have suggested. See, e.g., Steven Epstein, Gay Politics, Ethnic Identity: The Limits of Social Constructionism, 93/94 SOCIALIST REV. 9 (1997).
\textsuperscript{135} WILLIAM ESKRIDGE: THE CASE FOR SAME-SEX MARRIAGE 8–9 (1996).
\textsuperscript{137} Barbara Kantrowitz, Gay Families Come Out, NEWSWEEK, Nov. 4, 1996, at 50, available at 1996 WL 13455272 (describing gay and lesbian couples' difficult encounters in their families' social settings, such as sports, recreational activities, and school).
different moral conclusions each draws from his or her experiences in those kinds of communities.

Second, Eskridge’s description of the “identity” interest of gay and lesbian tenants, which is in line with modern views of the autonomous self, does not tell the whole story either. At stake for conscientious gay and lesbian partners is not simply the negation of an “identi[y] based upon beliefs, feelings, cognitions and emotions.” At stake may well be the same kind of “call of the Other” that is at stake for Mrs. Smith, as for any heterosexual married couple. Mary’s conscientious sense that she must be faithful to Martha even at great social and economic cost to herself is not best characterized as an internal choice that she makes, based solely on her own emotional and other needs, preferences and values. Her faithfulness is brought forth by the call of Martha’s need, the demand of Martha’s person for a committed response of love. That there is a relationship, and in some religious traditions even an identity, between the call of the Divine and the call of the needy Other, is clear. However, even a secularist in a committed relationship can attest that he or she finds him/herself impelled to risk and suffer, even to break the law, at the call of the Other. Through any number of exceptions, including the spousal privilege, the law recognizes this sense that one is called by the Other to invert the usual demands of the law.

Again, the founders’ recognition of the claims of conscience as the key to religious liberty provides no clear way to distinguish or prefer Mrs. Smith’s belief that she is called by God to refuse to cooperate in an unmarried couple’s evil, the religious couple’s belief that they are called by God to love each other for a lifetime, and the secular couple’s belief that their partner’s need and self calls them to commitment in an intimate, lifelong relationship.

It may well be, of course, that the unmarried partnership that Mrs. Smith is rejecting has nothing to do with the Joneses’ conscience at all; it may simply be a matter of personal taste and preference—she happens to prefer this person and this arrangement to any other, and does not like people telling her what her choices and preferences should be. But if Mrs. Smith is granted the possibility of conscientious action which is compelled out of her loving

---

138 Eskridge, *Coming Out*, supra note 27, at 2418.
139 In those religious traditions that understand the Divine to be other than the self or the neighbor, there is still often an unbreakable link between what one owes God and what one owes the human Other. In Christian traditions, one way of describing this relationship has been to say that through natural law accessible to every person in her conscience, God calls all human beings to respond to God and to the neighbor’s need in love. *See Forell, supra* note 128, at 38, 129.
obedience to the Divine, so must the couple who—even against a religious majority's argument—believe that their relationship is dictated by their own conscience, whether it is expressed in distinctively religious terms or not.

In a situation of such uncertainty and direct conflict of conscience, the religious freedom proposals of McConnell and voluntarists like Tom Berg¹⁴¹ are tempting. Berg has artfully exposed the dilemmas of postmodern readings of the Free Exercise Clause;¹⁴² but he is uncomfortable accepting the ambiguity of the postmodern solution and its reliance on contextual interpretation.¹⁴³ Instead, he proposes a fair clarity in the voluntarism principle.¹⁴⁴ If government is uncertain about whether there are relationships to the Divine (or Others) that might be morally prior to the state's demands, and is dedicated to humility about its competence to adjudicate between them, a theory of non-interference seems to be the most sensible.¹⁴⁵ In this view, the government should not intercede to require Mrs. Smith to rent her room to the Jones couple, nor should it reward Mrs. Smith for her decision to refuse rental, either symbolically or tangibly. After all, the government's failure to act would seem to signal that it respects the possibility that either one litigant or the other might be correct, or at least that it is incompetent to decide who is. I would argue that voluntarism is an inadequate response to the problem of conflicts in conscience that implicate public policy. Voluntarism may accede in a formal way to the possibility that either the landlord or tenant may be right about what conscience compels, but it does not account for the anthropological dilemma which lies behind any number of the Free Exercise cases, and certainly no less in the Smith v. Jones dilemma. Voluntarism accedes to the possibility that each side might be compelled by conscience, an important concession to get religious rights a hearing, rather than relegating them to the status of private tastes or legally noncognizable rights. However, voluntarism does not fully account for the possibility that each side might not be compelled by conscience, as well. This is a critical issue for a doctrine of religious freedom forged out of a Reformation anthropology.¹⁴⁶ For the anthropology—and indeed the theology—of the Reformation is critically focused on the dual reality that human understanding is a divine gift and that God's expectations are indeed "written on the heart" of every person, and at the same time, that understanding is

¹⁴¹ See Berg, supra note 92.
¹⁴² Id.
¹⁴³ See id. at 693–94.
¹⁴⁴ Id. at 694–95.
¹⁴⁵ Id. at 736–37.
¹⁴⁶ For a general discussion of the Protestant understanding of the human condition, see FORELL, supra note 128, at 123–58.
corrupted by the human will to self-justification and self-interest. The theology of the Reformation—the understanding of the relationship of the human person to the divine—is necessarily off limits in a religiously pluralistic culture. Yet, its theory of human nature, recognizing that human beings are both good and evil and their understandings and wills are both trustworthy and corrupt, is one that can be acceded to by both religious and secular persons, since a wide variety of sources substantiate this judgment, including experience, reason, history, the arts, even science.

I would probably agree with Berg that, if we could only choose between a religious freedom theory that accorded respect to claims of conscience, risking "fakers" (as voluntarism does) or a theory designed to avoid free riders or religious preferences at the risk of harming those divinely called, voluntarism is preferable. However, the best resolution of the Smith v. Jones case accounts for four possibilities: that Mrs. Smith is acting from conscience and the Joneses are not; that the Joneses are acting from conscience and Mrs. Smith is not, and finally, that both or neither are acting at the behest of Another who calls them inexorably to a moral life. In a different case, where Mrs. Smith or the Joneses are up against the state, awarding the individual the whole panoply of remedies may be necessary. The absoluteness of the state's power may well make state officials so arrogant or complacent that they are unlikely to question their own judgments without an immense constitutional show of force checking them. However, in an individual rights versus rights case, awarding both the right and full remedies to either Mrs. Smith or the Joneses is not likely to get them (or us) to ask whether they are indeed vindicating a right of conscience or not.

III. THE REMEDIES RESPONSE: AN EXERCISE IN SLOW MORAL CONVERSATION

As I have suggested, voluntarism does not fully account for the possibility that Mrs. Smith and her tenant not only might be persons of conscience, but also that they might not. Or more precisely, it abandons to the private sphere the moral duty to challenge both Mrs. Smith and her tenant on the question of whether they are indeed conscientiously compelled out of relationship to God or Another to make the stand they do, or whether self-interest, stubbornness, pride, or simply prejudice drives their decisions. The state does not put Mrs. Smith and her tenant into a room, as it were, and expect them to "duke it out," conscience to conscience. If one of them is indeed wrong (or if both of them are), an assumption which refuses the "common sense" that conscientious choice is merely a taste and not a matter of truth, then he or she will never come to know that fact.

147 Id. at 125-29; GUSTAF WINGREN, LUTHER ON VOCATION 123-24 (Carl C. Rasmussen, trans., 1957).
148 WINGREN, supra note 147, at 36-38, 42-50.
This lack of accountability through law might not be a real problem if American society had enough independent mediating institutions with sufficient moral standing in the entire community that both Mrs. Smith and her tenants could be called to account for their positions. But if there is such a form of institution pervasively situated in American culture that currently has both the moral authority and the courage to call a recalcitrant Mrs. Smith on the phone and ask her to meet up with her tenant to see who is morally right, I do not know of it. (One can hope, of course, and imagine possibilities for nurturing such institutions in religious communities, local community groups, and quasi-governmental institutions such as public education).

On the other hand, strong state compulsion, such as the threat of a jail term or a stiff financial penalty such as a large damage award, may similarly never require Mrs. Smith and her tenant to face each other as moral persons and take account of the possibility that the moral position of the other person is the correct one. If Mrs. Smith is acting out of prejudice or self-interest instead of the relational demands of conscience, forcing Mrs. Smith to take the tenant will simply reinforce her mistaken impression that she is acting out of conscience. In her mind, it may simply give her an excuse to claim victim status, as the lone individual up against the heavy legal machinery of the state.\textsuperscript{149} The modern restorative justice movement recognizes that the failure of two contesting individuals to confront each other is not simply a moral failure, but is likely to result in a pragmatic failure of resolution of the conflict as well.\textsuperscript{150}

Indeed, those steering the Fair Housing Act to passage in 1968 seemed also to fear that a demand for huge penalties against housing discriminators would only retard, if not countermand, the progress that the very passage of the Act signaled. The 1968 version of the Act was hard on liability and soft on penalties in its final form. Originally, the bill proposed by Senator Mondale as an amendment to a civil rights worker protection statute provided for much broader enforcement options.\textsuperscript{151} His version of the Fair Housing Act provided for HUD enforcement through conciliation first, followed by a federal complaint, hearings, and finally administrative enforcement orders backed up by judicial review.\textsuperscript{152} Illinois Senator Everett Dirksen proposed to

\begin{footnotes}
\item\textsuperscript{149} See, e.g., Howard Zehr, Restorative Justice: The Concept, CORRECTIONS TODAY, Dec. 1997 at 68; Virginia Mackey, Restorative Justice: Toward Non-violence, 21 (a discussion paper on crime and justice from the Presbyterian Criminal Justice Program, Louisville, Ky. 1992); Villa-Vicencio, supra note 20, at 169 (discussing Nietzsche's views that social punishment reverses the roles of victim and perpetrator).
\item\textsuperscript{150} Zehr, supra note 149, at 68–70.
\item\textsuperscript{151} Bond, supra note 5, at 323.
\end{footnotes}
soften the enforcement mechanisms of the Act in order to secure passage, as well as to exclude certain owner/occupant-sold single family homes from its purview.153 After a series of eighty amendments and a debate in which Mondale had to invoke cloture, the Act was passed with an enforcement mechanism with substantially fewer teeth in it.154

On paper, Fair Housing Act enforcement after 1968 could be achieved by administrative HUD proceedings, state or local agency proceedings, a civil action by the victim of housing discrimination, or pattern and practice suits by the Attorney General.155 However, the only meaningful enforcement mechanisms were administrative conciliation and private lawsuits, which had to be pursued in state or local agencies or state courts whenever state law gave “substantially equivalent” protections.156 Critics of the Act also objected to its limitations on available relief: private plaintiffs could get injunctive relief, actual damages and up to $1000 in punitive damages, but attorney fees and costs were limited to cases where plaintiffs could not pay their own expenses.157 As it turned out, the Department of Justice filed only three hundred suits from 1968 to 1980, and under the Reagan administration, even this small number declined.158

The response of housing discrimination advocates to this failure of relief was to demand revisions to the Act. Congress, opposed by the Reagan administration, worked on a revision bill from 1980 to 1988, when the Fair Housing Act Amendments (FHAA) of 1988, incorporating some parts of the Reagan administration’s counterproposals, were finally passed.159 The 1988

154 John O. Calmore, Race/ism Lost and Found: The Fair Housing Act at Thirty, 52 U. Miami L. Rev. 1067, 1070–71 (1998); Ware, supra note 13, at 72; Bond, supra note 5, at 323–26.
155 Ware, supra note 13, at 77.
158 See Bond, supra note 5, at 327 (noting that while there were 5100 federal fair housing complaints in 1982, the Reagan administration filed only two fair housing cases in 1982 and six in 1983); 134 Cong. Rec. E3384–02 (daily ed. Oct. 11, 1988) available in 1988 WL 177270 (remarks of Rev. Drinan) (describing the decades-long political action necessary to counter Reagan administration opposition to Fair Housing Act amendments).
amendments not only expanded the list of protected classes to include families with children and disabled persons, but significantly increased the remedies available. Administrators are not limited to conciliation, but may impose civil penalties of up to $10,000 for a first offense, with escalating monetary penalties for subsequent offenses. The FHAA also authorizes the Attorney General to file suit in cases where an “issue of general public importance” is involved, in addition to pattern and practice suits. Private rights of action may be brought up to two years after the discrimination occurs, and courts may award not only damages and injunctive relief, but civil penalties up to $50,000 for a first violation and $100,000 for any subsequent violation.

The Act’s original limited enforcement mechanisms, particularly its weak federal enforcement procedures and its extension of the Mrs. Murphy boardinghouse exemption to owner-occupied four-plexes and owner-sold single family residences was not merely a concession to recalcitrant conservative arguments that government has no business telling private property owners what to do with their property. It also signaled that, while the government was willing to throw its symbolic weight against racial discrimination and declare it morally wrong as a matter of American social, political and economic policy, it was willing to do so only against opponents who were fairly matched. The compromising Congress was not willing to send the federal government against widowed Mrs. Murphys but only against those commercial businesses which assumed the risk of regulation simply by entering the marketplace.

The Mrs. Murphy exemption recognized that the symbolic, economic, and personal oppression that a large commercial landlord could wreak upon a black person or couple far outweighed the harm that a Mrs. Murphy could cause by refusing, even out of the bitterest motives, to rent to them.

160 See Ware, supra note 13, at 81, 87; H.R. REP. No. 711.
163 See Ware, supra note 13, at 81.
165 But see Walsh, supra note 1, at 632 (arguing that discrimination by a “grandmotherly woman” would be just as harmful as a larger landlord, and quoting Senator Mondale’s comment that “segregated housing is the simple rejection of one human being by another without any justification but superior power.”).
166 See Walsh, supra note 1, at 609. Senator Mondale estimated that the Mrs. Murphy provision applied to two million of the nation’s sixty-five million housing units, 114 CONG. REC. S3424 (1968).
Indeed, the Mrs. Murphy exemption anticipated that Mrs. Murphy could not even draw social strength for her prejudices from her surrounding culture: by making the exemption narrow enough, Mrs. Murphy would be a morally isolated island of prejudice in a commercial sea of fair housing behavior.

As I have suggested, the crafters of the Fair Housing Act may also have carefully managed the remedies available to victims of discrimination to reflect the much more evenly divided social view at the time about whether racial discrimination was morally reprehensible. The testimony of Senators such as Sam Ervin and John Stennis on the floor of the Senate reflects the fact that even Congress was divided about the moral wrongfulness of housing discrimination, and that the bill was a racial compromise. The first Fair Housing Act provided largely for remedies that would encourage landlords to make changes of their own volition, rather than forcing them into the posture of victims. Taking the good faith of the landlords for granted and assuming that once informed, they would do the right thing, the Act provided for informal responses such as “conferences, conciliation and persuasion” as a mandatory first step. Moreover the Act’s remedies were largely prospective in nature, focusing on declaratory, injunctive, and ameliorative approaches through damages, rather than punitive awards such as treble damages. As time went on, however, Congress imposed ever-increasing penalties upon what was coming to be commonly recognized as the odious act of racial discrimination.

In hindsight, the weakness of the 1968 Fair Housing Act is perhaps quite properly viewed as a deficit from the beginning, though as I have suggested, whether proposed hard-charging, punitive-oriented or the actual soft-pedaled incremental enforcement of the Civil Rights Acts would have resulted in more substantive equality for African Americans still remains a historical debate. Yet, the magnitude of the problem faced by Fair Housing Act proponents may account, at least in part, for why “softer” remedies were unsuccessful in meeting the promise of the Act. Unlike the current debate over unmarried tenants, which is mostly conducted in individual rights terms and involves scattered individual landlords, the authors of the Fair Housing Act well knew more was at stake than individual harms suffered by black

---

167 See remarks of Sens. Ervin and Stennis, supra notes 1–2.
168 See Ware, supra note 13, at 63.
170 See 134 CONG. REC. S10544–02, (daily ed. Aug. 2, 1988) (remarks of Sen. Thurmond, noting the “remarkable compromise” across political interests on the Fair Housing Act Amendments of 1988) available at 1988 WL 174369. In addition to these changes, Congress has considered subsequent amendments that broaden the scope of the act to include criminal penalties for violating fair housing civil rights, such as the use of firearms or fire to intimidate people exercising their rights. See 136 CONG. REC. H9114–01 (daily ed. Oct. 6, 1990) (remarks of Rep. Sensenbrenner) available at 1990 WL 206290.
renters and home buyers: the Act was literally focused on changing ensooned segregative housing patterns that were severely damaging American social life for everyone, not just those denied housing. The Fair Housing Act was directed at what was deemed to be at the root of other problems including employment discrimination, segregated and inferior public education for African Americans, civil unrest in the cities, crime, and other ills. The history following the passage of the Act demonstrates that many of the truly tragic seemingly intractable problems of minority communities, including depressed and crime-ridden urban cores, inadequate public education and the lack of adequate employment for urban minorities were not substantially alleviated by the reality of Fair Housing Act litigation, even though its proponents' dream that equal housing opportunity might ward off some of the worst of these problems was not at the time so far-fetched.

In the Smith v. Jones controversy, what was a telling failure of the conciliatory/actual damages approach in the Fair Housing Act may hold the best possibility for success in resolving Justice Scalia's Kulturkampf represented by the religious landlord/gay tenants dispute. The right to equal housing opportunity for unmarried couples is not necessary to resolve the complex social and economic problems that race-based civil rights statutes were aimed at, and perhaps not even the extensive problems in gaining social and economic equal opportunity that the disability statutes were intended to address. The marital status nondiscrimination statutes are largely aimed at the symbolic and attendant material harms flowing from a moral conflict about the public worthiness of both the individuals and relationships involved, harms for which there are analogies in the African American civil rights movements, but only analogies.

In conflicts where the symbolic harms are easily as important or more important than the economic ones, such as in the gay tenant-religious

---

171 See Ware, supra note 13, at 61–62.
173 See Bond, supra note 5, at 327–28.
174 See Bond, supra note 5, at 327–28.
175 See Nancy Lee Firak, Threshold Barriers to Title I and Title III of the Americans with Disabilities Act: Discrimination Against Mental Illness in Long-Term Disability Benefits, 12 J. L. & HEALTH 205, 212 (1998) (describing purpose of the ADA as to defeat discrimination ranging from intentional exclusion of disabled people to the discriminatory effects of non-accessible facilities). When the 1988 amendments were passed, several Senators spoke about the pervasive effects of housing discrimination on the opportunities of the disabled, see 134 CONG. REC. S10544–02 (daily ed. Aug. 2, 1988) (remarks of Sens. Simpson, Hatch, Stafford, Moynihan, McCain, et al.) available at 1988 WL 174369; see also Clegg, supra note 4, at 1610–11.
landlord dispute, the Fair Housing Act strategy of initially using mild remedies, followed by ever-stronger ones, may best respond to the practical reality that people are divided on the question of gay relationships. The approach of conciliation with the potential teeth of actual damage awards may hold out the best hope for respecting the moral conscience of both parties involved, while also strongly encouraging them to talk with each other about their respective moral positions, because neither wields the full weight of the power of the state. Such dialogue may not erase their disagreements but may at least help discussion to be conducted in a respectful and civil manner. In such cases, a remedies approach portends more hope than a liability approach can give.

The option of abandoning the moral field to the private sector is, as I have suggested, not likely to give equal respect to the conflicting views of the participants in this battle. Failure to give a civil right—a “liability right”—to the tenants eludes the possibility for the confrontation between consciences. Although too much can be made of the uneven bargaining power of a small landlord as compared to her potential tenants, the fact is that Mrs. Smith is “one-up” on her tenants because she is able to pronounce her moral judgment “with teeth,” which means that the tenants may well be stigmatized and emotionally harmed. She is expressing her moral judgment in a situation where she has an important good to give or deny, a good which has more than economic value to them as the place they have searched out to make their family’s home. As suggested previously, even without being overly romantic about the human nesting instinct, for most couples, the choice of a particular home, even a short-term apartment that resembles hundreds like it, is peculiarly tied up with a sense of their personhood, just like their heirlooms or clothing. To suggest that the denial of the sense of the safety that one’s chosen home confers is the equivalent of denying them merely an economic bargain flies in the face of most humans’ experience of searching for home.

Granting the liability right to the tenants, but the remedy advantage to the landlord has prudential advantages in the culture wars. If we assume that Mrs. Smith (and her tenant) might be right and might be wrong about what the Divine or the need of the other compels, to give Mrs. Smith’s tenants some leverage to confront her conscience forces her to ask whether she indeed is exercising her right of conscience or simply her prejudices, because she will have to pay for her choice. She will pay not only in actual damages, but in the confrontation with the community which labels her act as legally wrongful. Indeed, we may presume that if Mrs. Smith is hiding behind a prejudice, she may be forced out of the closet if she has to choose between renting to these tenants without incident or facing the public condemnation of legal liability.

On the other hand, if her tenants are simply on a power trip to punish Mrs. Smith for her religious disapproval, limiting their remedies is also more likely to smoke them out. If they have been insulted, but not significantly harmed, by Mrs. Smith’s disapproval and refusal to rent, they are unlikely to
pursue the insult through the courts when their only recovery can be actual damages. Indeed, an actual damage remedy may force them to ask how much they have indeed been damaged, and reduce what may initially seem like an egregious wrong to its proper emotional place in their lives. To make sure that they too are tested on whether their claim is one of conscience or human rights, initially actual damages should be limited by the mitigation principle: tenants should be required to show that they have lost something tangible.\textsuperscript{176} Thus, at least in the initial legislation, damages for the expense of finding another apartment, including lost wages and travel, should be included, while damages for emotional distress or dignitary harms should not. As social consensus on the wrongfulness of discrimination solidifies, statutes can be amended to add damages for dignitary and emotional harm, and perhaps punitive damages to reflect society's condemnation of discriminatory acts.

Moreover, the elimination of injunctive remedies in early legislation will serve to protect the most important conscientious claims of both Mrs. Smith and her potential tenants. As the McConnell argument points out, Mrs. Smith's best defense against the marital status statute is that she will be coerced into abandoning her religious or moral beliefs, and forced to participate in evil. If the tenants cannot force Mrs. Murphy to rent to them but can only collect actual damages, Mrs. Smith's complaint becomes only that she should not have to pay a cost for her religious beliefs, even the cost of the harm she has visited upon the Jones couple.

Mrs. Smith's demand to be excused from even actual damages through an exemption is out of step with Free Exercise jurisprudence in two ways. First, that jurisprudence reflects an expectation that religious dissenters pay significantly higher costs to exercise their religious beliefs when they are out of step with important state values than when they are not. In some cases, this implied requirement that a Free Exercise claimant show some willingness to sacrifice for her beliefs, such as to live on unemployment benefits rather than her salary as Mrs. Sherbert did, is an indirect test of religious claimants' sincerity—a way to smoke out those claimants who use religion to obtain free rider status from generally applicable responsibilities.\textsuperscript{177} (Indeed, successful Free Exercise claims have been largely limited to those cases where the price of asking for a religious exemption is substantially weightier than Mrs. Smith's; even the potential

\textsuperscript{176} A more difficult question is whether a lost benefit of the bargain should be awarded. See, e.g., Zahorian v. Russell Fitt Real Estate Agency, 301 A.2d 754, 758 (1973) (Tenant proved that she was required to rent a similar apartment for $30 more per month for a year). However, Zahorian's damages for $750 for pain and suffering would not be cognizable under this approach. \textit{Id.}

loss of one’s business, such as in Braunfeld,178 or job, as in Smith,179 have been expected prices for following one’s beliefs.) From a theological point of view, if her religious claims simply seem to line up with personal gain or preference, Mrs. Smith’s religious and moral community should be questioning her on whether she is simply justifying herself using religion as a means to her self-interested end, or whether she is indeed following the demand of the Other.

In other cases, the requirement that Free Exercise claimants themselves show some personal sacrifice has served as a recognition that conscience claims coming out of a deep, sacrificial commitment to a divine Other or a religious community are more socially valued, and indeed, perhaps more to be trusted as truth-telling about the wrongfulness of the community’s laws, than religious claims that seem simply to further the claimants’ self-interest. Even in a secular sense, a sacrificial claim of conscience—a civil disobedient’s willingness to go to jail, for example—is more likely to morally engage and instruct the community on what it means to be a virtuous citizen and what the community’s moral response to a social dilemma should be than a religious claim that seems simply to mimic self-interest, such as refusing to pay taxes. I would not want to go so far as to suggest that substantial sacrifice should be required of Free Exercise claimants, as the Supreme Court sometimes seems to do. But the imposition of a moderate sacrifice on Mrs. Smith as a price of her (state-sanctioned) conscientious objection should not automatically spell constitutional relief for her.

Finding against Mrs. Smith on liability but limiting her damages also responds to the problem of religious equality that lurks in each difficult case where neither neutral laws nor religious accommodation seem to result in full equal treatment of citizens.180 Religious equality and neutrality advocates worry that giving exemptions to religious claimants may grant them a windfall that non-religious objectors do not share, or make them free-riders on the system,181 thus putting the weight of the state behind the truth of their claims. Her secular counterpart who simply does not want to rent to gays makes a difficult point in suggesting that Mrs. Smith is asking for special treatment to which he is not entitled. Because a non-religious claimant would be expected to pay for the damage he causes another by discriminating

181 For example, in both the tax cases and the conscientious objector cases, one implied area of the Court’s concern is that secular and other religious claimants will have to bear duties, such as paying taxes or losing their lives in war, that objecting religious claimants do not. See a description of this debate in Michael W. McConnell, Accommodation of Religion: An Update and A Response to Critics, 60 GEO. WASH. L. REV. 685, 727–29 (1992); see also Gedicks, supra note 39, at 98, 101–02.
against him, to afford no redress when the perpetrator is religious sends a message that she is considered a more valuable citizen than the victim. By requiring some reasonable sacrifice by such objectors, like requiring Mrs. Smith to pay actual damages, religious claimants are put somewhat on a parity with those who cannot claim the law's exemption. Yet, if the redress is limited to actual monetary losses, Mrs. Smith is not being asked to give up even more—her life's work or her conscience. She is simply being asked to give up some personal wealth for the person whom, from the secular state's viewpoint, she has harmed. To ask for a limited personal economic sacrifice, if she is a religious person, is probably not to ask for anything she does not do every day, on behalf of family, religious community, and civic community. Thus, though too much sacrifice can be and has been demanded by the courts, the "sacrifice factor" takes at least a step in the direction of the religious equality principle.

IV. CONCLUSION

I have argued that, in times of significant moral contest about the existence and definition of human rights that conflict with each other, a legal approach willing to divorce right from remedy to give some recognition of the dignity of each person's rights claim may result in a more preferable long-term legal outcome for human rights than to pre-empt the rights discussion by awarding both right and full remedy to the party on one side of the controversy. Perhaps the most important reason for doing so, including in the conflict between the religious landlord and the gay/lesbian tenant, is that it has the best chance of ensuring that there will be moral discussion so necessary in our society about the rights that gay and lesbian couples, in particular, are seeking. If Mrs. Smith is "one-up" on her tenants with the power to deny them a necessary and chosen good, imposition of liability for her moral choice—assuming appropriate remedies follow—is more likely to put both Mrs. Smith and her tenant in the position of making the moral challenge to each other. If the tenant is truly pursuing a claim of conscience, he will file the lawsuit and pursue the path of conciliation to get his potential landlord to see that what she is doing wrongs him, his partner, and ultimately the community. If Mrs. Smith knows that she will have the opportunity to "talk back" to the unmarried couple who hope to rent from her, to share with them her beliefs about why their relationship is wrong without state coercion, she is less likely to dig in her heels and refuse to discuss the issues at stake, relying on her raw power as a property owner to shut the door in their face. She will have to pay a price for her exercise of conscience, but it is either the

\[182\] See, e.g., Braunfeld v. Brown, 366 U.S. 599 (1961) (requiring Orthodox Jew to give up his business, if necessary, to follow his beliefs); Goldman v. Weinberger, 475 U.S. 503 (1986) (requiring Orthodox Jew to choose between employment in the Armed Forces and the requirements of his faith).
tangible damage she inflicted upon the couple who sought her apartment, or the price she is willing to pay through a mediated settlement. If the matter stays in litigation, the price of her conscience will similarly be limited to tangible harms that the tenants have actually suffered, modified by their duty to mitigate damages.

Mrs. Smith may, of course, argue that the state is visiting a stigmatic harm on her, claiming that her decision to exercise her conscience is wrongful. Yet, Mrs. Smith has already made the decision that she should “obey God rather than men.” If, in her conscientious view, the state is acting wrongly and in violation of God’s will by deciding that she has discriminated, Mrs. Smith is unlikely to view the state’s “message” that she is a wrongdoer as dispositive, or take its attempt to stigmatize her much to heart.

Of course, the remedies approach rests upon three notions somewhat alien to the American way of resolving problems of injustice. First, it accepts the hard fact that the ideal solutions of the civil rights movement approach are likely never to be realized in practice, that equal outcomes are likely never to be achieved through law. That is, in religious terms, it accepts the intractability of human sin, the reality that individuals will always find both reason and justifications for stigmatizing and diminishing each other, no matter what the law says, even while it does not accept such disrespect as normative. Or at the least, the remedies approach recognizes that civil rights law is an exercise in slow moral conversation, a dialogue that is unlikely to be resolved overnight but rather requires painstaking discussion, demanding as its (never acceptable) cost numerous victims of discrimination along the way.

Second, the remedies approach accepts the possibility that all-or-nothing may be wrong, that it is possible for both Mrs. Smith and the Joneses to be right about what human dignity requires. Even though such a possibility may seem contradictory, paradoxical and yield legal responses only with difficulty, it may better reflect what we have come to know about living in a diverse human community.

Third, the remedies approach rejects the assumption that the traditional marriage of liability and remedies, which does not really force the contending parties to confront each other’s moral claims, is a preferable approach when constitutional rights are conflicting. That is, it at least partly rejects a general claim that the litigation model is a more publicly successful model for defining the Constitution than mediation and other approaches.\(^{183}\) While this

\[^{183}\text{See Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1085 (1984) (arguing that adjudication can “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes [and] interpret those values and . . . bring reality into accord with them”); see also David Luban, Settlements and the Erosion of the Public Realm, 83 GEO. L.J. (continued)
assumption may be true when broad constitutional claims against government bureaucratic action are at stake, it is not as apparently true when individual rights holders are fighting each other over personal claims of human dignity and conscience. In those cases, direct confrontation through conciliation or mediation, with the possibility of solutions that might satisfy the dignitary concerns of both parties, may result not only in more just settlements, but also in a more respectful pluralism.

It must, however, be recognized that the use of mild remedies to enforce an important human right has potential drawbacks. First, as has been borne out by the Fair Housing Act, real wrongdoers may be tempted to gamble to deny a renter a place to live, figuring that the tenants' costs to litigate are likely to be more burdensome than any damages landlords will end up having to pay out. Simple reimbursement damages do not always change behavior, or redress wrongs, given the sacrifice that plaintiffs need to make to come into court, as the law of punitive damages recognizes. Second, affording only mild remedies for discrimination against unmarried couples, especially gays and lesbians, may mean that the issue of whether such discrimination is acceptable goes off the public "radar screen." Just as high jury verdicts and punitive damages or massive equitable remedies (such as the breakup of Microsoft) get people to talk about what justice really does require in our society, so minimal damage remedies may suggest that there is no need for public scrutiny or discussion of the issue. Finally, there are potential psychological harms: victims may feel that the stigmatic harm visited on them is unrecognized or delegitimated because no monetary recognition of the harm is available, and they may feel no sense of emotional closure. There are no easy responses to these criticisms, except to suggest restorative justice processes that make room for apologies to victims, for discussion of both parties' views about what is at stake, and for a perpetrator to have to look his victim in the face.

The vision of a truly engaged discussion between opposed civil rights claimants is, of course, optimistic, but it is surely no more optimistic than the presumption that constitutional litigation will bring about justice for groups who suffer from discrimination in our society. The remedies approach, which is more likely to push competing claimants into that conversation, is practical in one very important sense. It recognizes that human communities resolve difficult issues over time—that the question whether sexual orientation or behavior is a proper basis for denying a person a place to live is not likely to be resolved in a whirlwind, as people had hoped would happen with the Fair Housing Act. Indeed, the remedies approach recognizes that human beings can hold just as intractably to self-interested, evil views as to


184 Fiss, supra note 183, at 1085.
morally laudable claims of conscience. Just as it takes time to tell the truth about one part of the community’s oppression of another and the complex ways in which that community justifies that oppression, it takes time to tell what is true in Mrs. Smith’s reasons for denying a tenant a place to live, and what is true in the tenant’s right to live as she chooses.